ited States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,393

GREAT FALLS COMMUNITY TV CABLE CO., INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents,

HARRISCOPE BROADCASTING CORPORATION,
SNYDER & ASSOCIATES,
TELEPROMPTER TRANSMISSION OF KANSAS, INC.,

Intervenors.

On Petition for Review of An Order of the
Federal Communications Commission

APPENDIX FOR PETITIONER

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March 8, 1968

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APPENDIX A

Extracts of FCC Orders and Notices Regarding Regulation of CATV.[1]

I

Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting in Docket No. 12443, Adopted April 13, 1959, 26 FCC 403

IV. THE THREE BASIC LEGAL ISSUES

57. We have set forth for consideration herein three basic legal questions involved in any course of action we might adopt. These are: (1) what basis is there under present law, if any, for our assumption of licensing and regulatory powers over CATV systems (issue No. 11); (2) would it be legally valid for us to deny authorization for common carrier facilities for transmission of programs to CATV systems on the ground of adverse competitive impact on an existing local or nearby television station (issue No. 12); and (3) whether economic injury to a television station can be a valid public-interest justification for denial of authorizations to auxiliary services which compete with such station (issue No. 13). We consider these questions, in order, before proceeding to discuss the various proposed courses of action. 26 FCC 426

* * *

[1] These extracts contain material repeatedly cited in Petitioner's Brief, principally from Commissioner Loevinger's dissents. It does not purport to present a complete or balanced statement of Commission policy or ruling on its regulation of CATV. Complete texts are available in the FCC reports.

Therefore, we adhere to our decision th
do not have jurisdiction over CATV's under section 3(h) anc
II of the act, even though we assume (without deciding) they m
within the scope of section 3(a) which defines "wire communica
and includes "all instrumentalities, facilities, apparatus and
ices * * * incidental to such transmission." The other argu
advanced by Frontier in its petition for reconsideration (e.g., th
recognize economic impact upon broadcasting in our consider
of microwave common carrier applications) are considered elsev
herein.

62. *Jurisdiction over CATV's as "engaged in broadcastin*
Section 3(b) of the act defines "radio communication" as the "t
mission by radio of writing, signs * * * including all instrume
ities, facilities, apparatus, and services (among other things
receipt, forwarding and delivery of communications) incident
such transmission." Section 3(o) defines "broadcasting" as "th
semination of radio communications intended to be received b
public, directly or by the intermediary of relay stations." Se
3(cc) defines "broadcast station" as "a radio station equippe
engage in broadcasting as herein defined."

63. As for the suggestion that CATV systems are "instrume
ities" within the meaning of section 3(b) and that therefore
they are engaged in the distribution of broadcast television prog
to these members of the public who reside in locations which
CATV can feasibly reach and who are willing to pay the ch

ed) they are engaged, in a sense, in "broadcasting," this would f itself give us jurisdiction to regulate these systems. Section the act provides in general that the operation of any apparatus e transmission of energy or communications or signals by radio be only pursuant to the act and in accordance with a license thereunder by the Commission. This section clearly does not e the transmission of programs by CATV systems, since such nission is by wire. We find no basis in the definitions contained ion 3 for the assumption of authority over these systems.

Regulation under "plenary power" over communications.—It is that we should regulate CATV's under our "plenary power" ommunications. Some parties have cited to us in this connec- arious subparagraphs of section 303 of the act, under which we powered to classify stations, encourage the use of radio, make tions applicable to chain broadcasting, and generally make such nd regulations, not inconsistent with law, as may be necessary y out the act (subsecs. (a), (b), (f), (g), (i), (r)). However, not believe we have "plenary power" to regulate any and all rises which happen to be connected with one of the many aspects munications.

Authority under section 325(a), or similar "property right" t.—Section 325(a) of the act (which is in substance the same as responding section of the Radio Act of 1927) reads as follows:

> erson within the jurisdiction of the United States shall knowingly utter mit * * * any false or fraudulent signal of distress * * * nor shall any sting station rebroadcast the program or any part thereof of another sting station without the express authority of the originating station.

broadcasters argue that CATV systems are included within this ion, as "broadcasting stations" engaged in "rebroadcasting" actice, as already mentioned, it appears that CATV's seldom t to get such consent). They cite in support of this position ment by Senator Dill, one of the sponsors of the Radio Act of in connection with Senate consideration of that legislation. 8 Cong. Rec. 2880.) Therein, Senator Dill urged the adoption provision because otherwise a station would spend considerable for a program and it could then be picked up and broadcast other stations, "and particularly over the wired wireless, and charged for listening to it." The reference to "wired wireless" n as an indication that Congress had in mind wire retrans- n of the sort since developed by CATV systems. However, on must also be given to the rest of Senator Dill's statement, reads as follows:

> The provision referred to does not prevent rebroadcasting, but it does those who would rebroadcast to get permission from the original broad- I do not think the construction placed upon the section by the gentle- o sent the telegram is justified. Of course he cannot rebroadcast it, roadcasting is not publishing. It has a generally understood meaning, *the reproduction by radio of the broadcasting itself.* [Emphasis il.]

ference to "reproduction by radio" in the last sentence would exclude reproduction or distribution by wire as in the case of 's.

66. We have in the past indicated our approach to a some similar question, in our Report and Order on Amendment o broadcasting Rules (1 R.R. (Pt. 3) 91: 1131). We were ask that proceeding to hold that section 325(a) was meant to prote property right of whoever had such a right in the particular prog and that therefore consent should be required to be secured not from the station rebroadcast but from the network station origin the program, or the sponsor or advertising agency which bore th of producing it. We quoted Senator Dill's statement, and obs that it appeared that Congress intended to protect the property r in the program of those having such rights—in 1927 generall station but now frequently others. We stated, however—

> To the extent that section 325(a) may no longer accurately reflect p conditions or effectively carry out the original intent of Congress, the a ment of the section, or its repeal insofar as it pertains to rebroadcasts matter requiring legislative action.

67. We are of the same view today. It may well be that Con would desire to protect the property right of a broadcaster as ag CATV retransmission as well as against rebroadcasting. For reason, as well as because of the competitive impact involved we intend to recommend to Congress that an appropriate amend to section 325(a) be enacted, so as to extend the "consent" require to CATV's. But we do not believe that we can conclude that se 325(a) in its present form includes the requirement that CA get the consent of the stations whose signals they carry.

68. By other broadcasters, who do not urge that section 325(a) goes so far, we are asked to recognize the existence of a prop right, and to affirm it by rule; then, it is said, we would be in a posi to issue "cease and desist orders" against any CATV system rebr casting a signal without permission. This course of action we do believe appropriate. This is not the forum in which the existenc nonexistence of a private property right can be adjudicated; we in this connection that while CATV's have been in comme operation for nearly a decade, no serious prosecution of this c has yet been made by any broadcaster, as far as we are aware. U the existence of such a right is determined finally, either by jud decision or by congressional enactment, we cannot appropri consider a rule based on the assumption that it exists.

69. *Authority to regulate CATV's because of adverse effec broadcasting.*—It is urged by some broadcasters (often in conne with assertions made on the basis of secs. 3(b) and 3(o) menti above, or the "plenary power" theory) that we should regulate CA because they have a substantial adverse impact upon broadcas and tend to thwart what is our mandate under sections 1, 303, 307 to foster nationwide radio and television service, etc. Cited in connection are certain Supreme Court decisions dealing with the d industry (*United States* v. *Wrightwood Dairy Company*, 315 110 (1942), and *United States* v. *Rock Royal Co-op*, 307 U.S. In the *Wrightwood* case the Court held that purely intrastate tribution of milk in competition with interstate commerce is su to Federal regulation. Likewise, in *Houston, East & West T*

Railway Co. v. *United States*, 234 U.S. 342, the "*Shreveport* case," the Supreme Court held that the Interstate Commerce Commission could act to prevent a carrier from charging a discriminatorily low *intrastate* rate, though that Commission had no jurisdiction over intrastate rates as such. In short, it is argued, aside from the fact that CATV's are within some of the definitions of the Communications Act (although their being so makes the argument stronger), we can control them because of their effect upon broadcasting, clearly an interstate business and one which we are instructed to foster and lead to orderly maximum development.

70. Assuming this concept has legal validity (a point we believe is open to question, and upon which it is unnecessary for us to pass) in order to acquire jurisdiction on this basis, and *a fortiori* in order to utilize it, either in a rulemaking proceeding or on a case-to-case basis where we could consider whether or not a CATV system should be permitted entry into the field, we would have to make a finding that in a certain situation, or in situations falling within certain limits, there would be a substantial adverse impact on the local station. We have expressed above our inability to determine where the impact takes effect, although we recognize that it may well exist. Accordingly, we would find it impossible, from anything presented to us so far, to make the necessary finding, either in a particular situation or generally. Moreover, in any event, jurisdiction on this basis would exist, if at all, only in certain situations, and would therefore be a fractional approach to the problem. It is more appropriate to seek certain other specific remedies, discussed later herein. For these reasons we cannot appropriately proceed to regulate or control CATV's on this basis.

71. In sum, as to issue No. 11, we find no present basis for asserting jurisdiction or authority over CATV's, except as we already regulate them under part 15 of our rules with respect to their radiation of energy.

B. *The Economic Impact and Microwave Common Carrier Authorizations*

72. With respect to issue No. 12 in the notice of inquiry, it has been urged by most of the broadcasters that the Commission is obligated, in making the determinations of "public interest" under sections 307(a) and 309(a) of the Communications Act, to consider the impact upon a television broadcaster of the grant of radio facilities to a communication common carrier, where the common carrier facilities will be used for the purpose of providing communication service to a community antenna system operating in competition with the broadcaster. Implicit in this argument is recognition of the fact that it is not the common carrier which competes with the broadcaster or affects him adversely; it is the CATV. To embrace this argument would require the Commission to consider the content of the communications handled by the carrier, and the ultimate use to be made thereof.

73. In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus,

for example, we might logically be requested to invoke a prohibit against access to common carrier facilities by such enterprises closed-circuit music and news services, closed-circuit theater televis operators, and, possibly, even ordinary motion picture and legitm stage operators, magazine and newspaper publishers, etc., compris all of the entities which compete with broadcasting for the time a attention of potential viewers and listeners. The logical absurdity such a positio:. requires no elaboration.

74. We have heretofore partially answered this argument in opinion *In re Application of Intermountain Microwave*, 24 FCC 16 R.R. 733 (January 1958), which we now affirm. Enlarging up that decision, we now wish to make this point: the "public intere considerations which pertain to the grant of a communications co mon carrier application are not the same as, or interchangeable wh those which pertain to the grant of either a Broadcast Service ap i cation or a Safety and Special Radio Services application. example, in the case of the latter, the Commission determines that public interest would be served by the allocation of certain frequene for use by certain types of services. After this determination, all fa remains, for each individual applicant, is to ascertain whether h i legally, technically, financially, and otherwise qualified, and to de mine whether he falls within one of the stated eligible groups. In the case of a broadcast applicant, on the other hand, despite the exi ence of broadcast frequency allocations and service rules, a m searching and complete "public interest" determination is made wh respect to each individual applicant, including an examination of he "content" of the service proposal. Thus, a broadcast applicant mus not only show that he is legally, technically, financially, and other se qualified, but he must also show, for example, explicitly how his pro posed operations will serve the "public interest," including progm plans and, under some circumstances, relationship to other medi of mass communications and other matters. In the case of the comon carrier applicant, in addition to the showing of legal, technical, fian cial, and other qualifications, there is, typically, the necessity for sh w ing that there are no other public communication facilities availble to do the specific job proposed; that the applicant is ready, able, nd willing to serve all members of the public who may desire the ser ce without discrimination; and that there is now in being one or mre members of the public who require the service, or some reasonble expectancy that one or more such persons will present themselv i the facility is authorized.[26] There is no examination of the "conte t" of the intelligence which is to flow over the communication circu.

75. We are of the opinion that, in relation to the authorization f a common carrier facility, whether it be for a radio facility under tle III of the act or a wire facility under title II, it is neither proer pertinent, nor necessary for us to consider the specific lawful use which the common carrier subscriber may make of the facilities of he carrier. To take a different view would place the Commission in the

[26] This simplified statement of matters to be considered is only an example. It is obvious that competitive common carrier considerations, or other particular pr ce may involve other points of inquiry.

nomalous position of acting as a censor over public communications, nd put us under the burden of policing, not only the use of such acilities but the content of communications transmitted on the fa- ilities. The logical extension of such a philosophy would require us o deny communications facilities of any kind (message telephone, elegraph, etc.) to CATV's and, for example, to deny access to facili- ies to those acting contrary to our concept of the public welfare. The djudication of these matters is beyond our province.

76. Finally, we wish to emphasize that the rendition of common arrier communication service involves some situations which may be nique in the field of public utility regulation. The broadcasters hallenge the propriety of regarding specialized microwave relay fa- ility operations, of the nature herein discussed, as being common car- ier operations. It is not unusual, in the communications field, to find carrier providing a regulated particular type of communication ervice over a particular route for a single customer. The carrier nay be one who offers a specialized type of service, as distinguished rom one who offers a general service. (See *In the Matter of Alloca- ion of Frequencies, etc., for a Theatre Television Service*, 9 R.R. 528, 1538–1539.) Also, it must be remembered that many com- nunications common carriers traditionally and regularly provide ervices which are designated "private line services." Such services nay, for instance, comprise single or multiple communications paths o one or many points for a single customer. In a context more losely related to the instant problem, we point to the fact that many roadcasters utilize the services of Bell System Co., or independent elephone companies, where the carriers provide a tailor-made, espe- ially constructed microwave facility comprising an off-the-air pickup oint, and associated relays terminating in the broadcaster's studio. his is a typical broadcaster's private line common carrier facility here there is, in fact, only one user or subscriber involved and where nore than one such user on that particular facility is seldom, if ever, ontemplated or expected. On the contrary, many common carrier nstallations affording similar pickup and relay services for CATV ystems (as specialized carriers) provide such service to multiple sub- cribers simultaneously and operate with the continued hope and ex- ectation that new and additional broadcast and CATV subscribers nay avail themselves of the use of the facility. In the communica- ions field, these activities have always been treated and regulated as communications *common carrier* offering. We find no basis to war- ant a change in this regard at this time.

77. For these reasons, we conclude that issue No. 12 in this pro- eeding must be answered by a determination that it would *not* con- titute a legally valid exercise of regulatory jurisdiction over common arriers to deny authorization for common carrier microwave, wire, r cable transmission of television programs to CATV systems on the round that such facilities would abet the creation of adverse com- etitive impact by the CATV on the construction or successful opera- ion of local or nearby stations.

78. *Requiring that microwave communication common carriers how consent of the station whose signals they transmit.*—One of the

most common of the broadcasters' requests herein is that the microwave common carriers supplying the CATV's be required to show that they or their CATV customers have the consent of the station whose signal is picked up and transmitted for such use by the CATV. It is felt that while the direct requirement of CATV consent may be beyond the Commission's power at present, at least the Commission can impose such a requirement on its licensees, the microwave carriers who serve the CATV's. Some broadcasters put this in terms of character qualifications, arguing that relaying or transmitting without consent is "piracy," and that the Commission should not license facilities whose sole purpose is to engage in such activities, in line with its stated policy of considering violations of law on the part of an applicant in considering his application.

79. This contention is without merit. As we have noted, the matter of whether a property right exists has not been adjudicated, and we could therefore not appropriately impose this requirement upon the carrier, for the reason stated above in connection with the proposed rule requiring CATV's to have consent.

80. Accordingly, we are now considering a number of pending applications for microwave common carrier facilities on which we have withheld action during this proceeding, and we propose, as soon as practicable, to resume the normal processing of such applications.

C. *The Significance of Economic Injury*

81. Issue No. 13 herein calls for a determination as to whether economic injury to a regular television station can be a valid justification, in the public interest, for denial of authorization to an auxiliary service which would be in competition with the stations. The broadcasters say "yes," *when the economic injury affects the public interest*, as by causing the demise of the local station and resulting loss of a local outlet and, perhaps, the loss of the only service to outlying areas. Serious degradation of the station's service resulting from the impact is likewise urged as a public-interest consideration. NCTA and other pro-CATV parties urge that the Commission should take here the same position it has traditionally taken in economic injury cases—that as a matter of policy economic injury to an existing station should not be considered, both because it is impossible to predict the future in this respect (it is said to be even less susceptible of proof in the present context) and because the Commission has no public utility control over broadcasting operations, and cannot review the rates, costs, efficiency, and similar matters (*Voice of Cullman*, 6 R.R. 164 (1950); *Southeastern Enterprises*, 13 R.R. 139 (1957)). They urge that broadcasting is an *area of free competition*. On the other hand, the broadcasters refer to the fact that we took cognizance of the facts of competitive economic life in the UHF–VHF situation, ordering deintermixture in certain areas on that basis. They also assert that in effect we have already answered this question, in our rule-making proceeding concerning translator authorization under this sort of circumstances (docket No. 12006). In disposing of that pro-

eding (Report and Order, FCC 57-886, 15 R.R. 1708 (1957)), we ted that the problem might well exist in some situations, but that so we could envisage situations in which the translator could operate the community (or a nearby community) without adversely af-cting the regular station. We decided that the problem could bet-r be handled on a case-to-case basis, in which we would consider e question in the light of such factors as terrain, the coverage of the anslator, the presence or absence of a CATV, the character of the egular" station (satellite, network, or nonnetwork, etc.)—factors nich should be thoroughly considered before determining whether translator should be disallowed. The broadcasters assert that there-re we have already determined that economic injury is to be con-dered, on an individual basis; they ask that we adhere to that posi-on. They say that they do not object to competition, or to our not king economic injury into account, where the question is one of *mpetition between regular broadcast stations*, between "likes," in-ead of the unequal, "unfair" competition which exists here between o different business activities which are not only on disparate com-titive footings but differ intrinsically in the extent to which they n serve the public interest.

82. In our recent holdings that we not only should not but legally uld not consider economic injury in the typical "new station in the arket" protest cases, we indicated a possible exception where 07(b) considerations" are involved (*Southeastern Enterprises, su-a; West Georgia Broadcasting Company*, 14 R.R. 275 (1957)). In *arroll Broadcasting Company* v. *FCC*, 17 R.R. 2066 (July 1958), e U.S. Court of Appeals for the District of Columbia reversed our *est Georgia* decision, holding erroneous our view that the Communi-tions Act does not give us power to consider the effect of legal com-tition. The court held that we must afford an existing licensee (in protest case) an opportunity to present proof of economic injury, nounting to public detriment, which would result from the grant of e application involved; if the evidence is substantial we must make dings on the subject.

83. Clearly, in the present series of situations there are "307(b)" nsiderations involved, since if the broadcasters' view is sustained, a mber of local stations may be forced off the air with resulting loss a local outlet and of the only service to some population. There-re, and considering the holding of the *Carroll* case, we believe our swer to the issue—as it is framed—must be "yes," as we intimated in r report and order referred to above. But we emphasize that in riving at this answer, all we say is that in authorizing a translator this kind of situation, or taking similar action with respect to other xiliary services, we will take into account—*when and to the extent at it can be established*—such adverse economic impact (of such aracter as to be of detriment to the public interest) as may result the local station. It should be noted, however, as the court pointed t in *Carroll*, that proof of such economic injury "is certainly a avy burden."

FIRST REPORT AND ORDER

(Microwave Relay to CATV) 38 FCC 683 (1965)

* * *

Opinion of Commissioner Loevinger Concurring in Part and Dissenting in Part in Dockets Nos. 14895, 15233, and 15971 (Proceedings re CATV's)

The Commission is issuing today a report and order, a notic inquiry and of proposed rulemaking, a memorandum on jurisdic and the text of new rules all of which relate to the problems pose community antenna television systems, commonly referred to

CATV's. These documents aggregate over 120 pages and set fo such a mass of detail that the outlines of the problem, as well as basic issues, are somewhat obscured, if not wholly submerged. cordingly, it seems worth while to restate very briefly and simply w the problems and the issues are, in order to indicate my points agreement and disagreement with the majority.

A CATV is a system comprising an antenna for receiving televis signals, and cables and auxiliary apparatus (such as amplifiers) carrying the signals received into a number of receiving sets. CAT are about as old as commercial television itself, the first syste having been started as early as 1950. CATV's have been developed order to fill the wants of those who either because of distance terrain were unable to get television signals off the air in satisfact quality or numbers. (See articles in Television Magazine, June 19 September 1964, and April 1965.)

For a variety of reasons, some of them related to actions of t FCC, the commercial CATV business has developed through ind pendent companies which transmit or relay the signals and other co panies which distribute the signals to subscribers. Typically the will be an antenna on some high point near a community which ceives the signals of a number of TV stations. These signals will transmitted either by microwave relay or by coaxial cable to a poi in the settled part of the community. At this point the relay co pany will deliver the signals to the CATV operating company. T latter will maintain and operate the system which distributes signals over wires to the homes of subscribers within the communit In some cases the relay company will deliver signals to several CAT companies.

CATV's were started in mountainous areas of Pennsylvania a Oregon where television reception was either poor or nonexistent f many communities. As it appeared that CATV's were able to bri good reception and offer a variety of services to communities f outside the major metropolitan centers, the companies spread to mo communities and got more subscribers. Over the years, as televisi has grown in both numbers of broadcasting stations and numbers homes, CATV has also grown, although by no means in proportio In rough figures there are now about 566 television stations in t United States covering some 266 markets (Television Magazine, Ap 1965, p. 85). Over 52 million U.S. households have television receive which is 92 percent of all of the U.S. households, ibid. The CAT industry today has about 1,300 operating systems serving about 1 million homes (Seiden report to the FCC, p. 1). CATV's are co centrated largely in one- or two-station markets. Most systems a fairly small in size, about 90 percent having fewer than 3,000 su scribers and the average having about 655 subscribers. Most CATV deliver five signals to their subscribers, although some deliver as fe as three and some as many as seven or more, ibid. However, t number and size of CATV's is growing and CATV systems are bei offered to more communities, and to larger communities.

The proliferation of CATV's is regarded by many in the televisio business as an economic threat. It is said that while the broadcaste

as the burden and expense of providing programing which the audi-
nce gets without payment and which must be supported by advertis-
ng, the CATV operator simply delivers the broadcasters' programing
subscribers and receives payment from them. This is said to con-
itute unfair competition. It is also alleged that the competition is
ot only unfair but destructive in some situations, because CATV's
eliver the signals of far-distant stations and deliver a relatively large
umber of signals to relatively small communities in which the audi-
nce is not large enough to support a number of stations. CATV's
reate the anomaly that some relatively small towns are provided with
greater choice of television programing over the local CATV than
any larger cities have in the absence of CATV.

These circumstances have created a demand by many broadcasters
or the FCC to take jurisdiction over CATV's and to institute meas-
res to protect television broadcasters against competition of CATV's.
s will be pointed out in some detail below, the FCC has instituted
veral proceedings and investigations relating to this matter. How-
er, heretofore it has not taken any definitive action of general sig-
ficance. While there has been some question as to the extent of the
CC jurisdiction, the Commission has had undisputed jurisdiction
ith respect to licensing microwave transmitting facilities for those
lay companies that carry TV signals by microwave. The manner
exercising that jurisdiction is one of the matters that has been
tterly disputed and that is involved in the present proceedings.

By the documents which the Commission is now promulgating it
lopts a series of measures which represent the conclusion of the
ommission majority as to the action that the Commission should
ke in this field. There are four significant measures involved:

First, the Commission rules that CATV's must carry the signals of all local television stations without material degradation. The Commission exercises power over the CATV's by requiring licensed microwave relay companies to require their customers to comply with the Commission conditions.

Second, the Commission rules that the relay companies must require the CATV's which they serve to avoid the delivery to their customers of the television signals of any program which duplicates the program of any local station. This rule of non-duplication does not refer merely to simultaneous duplication, but requires CATV's to avoid presenting any duplicate program either 15 days before or 15 days after the date of broadcast by a local station. Thus, this rule provides that the CATV's served by the relay companies subject to the rule must avoid duplication of any local TV program for a period of 30 days.

Third, the Commission asserts jurisdiction over all CATV relay companies and systems, including those that are wholly intrastate and that transmit signals entirely by wire. Although this conclusion is called tentative, the background demonstrates that there is no practical possibility of dissuading the Commission from this conclusion. The Commission gives notice that the substantive measures already adopted will be extended to the full limits of this asserted jurisdiction as soon as the procedural amenities can be completed.

Fourth, the Commission institutes an "inquiry" seeking furth comment on more than a dozen and a half questions, all of the relating to the possibility of imposing further restrictions up the operations of CATV's.

It seems to me that in its approach to the CATV problem the Co mission is doing the wrong thing for the wrong reason in the wro manner to deal with the wrong problem. It is thereby erecting on a gossamer barrier against the evils which it fears.

The Commission is doing the wrong thing when it seeks to contr directly or indirectly, the specific programs which shall be present to the audience. The Commission is acting for the wrong reas because it seeks only to limit competition. The Commission is pr ceeding in the wrong manner because it is acting to extend its juri diction beyond statutory language and contrary to precedent. T Commission is dealing with the wrong problem because it concentrat attention only on the single matter of competition for listener attenti and substantially disregards more important and more basic problem Finally, the Commission is erecting only a gossamer barrier agai feared evils because the actions taken and proposed are not on wrong but must ultimately prove to be ineffective. Assuming that t Commission will assert jurisdiction over all CATV companies, a will impose nonduplication rules, and disregarding the risk that t action will be set aside for lack of jurisdiction, at best these ru will give slight and marginal protection against competition, and worst they will be wholly overturned on the whim of some futu Commissioner. This is not a sound basis on which to build an industr

Basically I concur in two of the four rulings made by the Co mission today and dissent from two of the four. I agree that t Commission should, within the scope of its jurisdiction, require CAT carriage of local television stations without degradation, and that should implement the rule so as to insure its effectiveness. I have disagreement with the substance of the rules regarding carriage local stations. I also agree that the Commission should undertake inquiry into the role and scope of CATV's, although I have some rese vations as to the inquiry now initiated by the Commission. I disagr with the nonduplication rule which I believe is an improper attempt limit competition by controlling programing; and I disagree with t Commission's attempt to extend its jurisdiction without congressiona authorization.

While I heartily agree that the Commission should conduct sweeping inquiry into the role and scope of CATV's in the field mass communications, it seems to me that the present inquiry is t little and too late. It is too little because it does not deal with fund mentals. Many of the important issues in the field are mentioned the notice of inquiry, but they are scattered through the somewh diffuse discussion in random fashion, even occurring in footnot But the basic issues are not mentioned. These are what the functi of CATV's should be, and what ultimate mode and system can developed or encouraged to provide the greatest service to the greate number. In various paragraphs of the instant orders and opinio CATV's are discussed as being ancillary or subsidiary facilities

broadcasting and as being a service competitive with broadcasting. These concepts seem inconsistent to me, and differing regulatory consequences flow from them. For example, if the services are truly competitive, then there is some reason to prohibit or discourage joint ownership of broadcasting facilities and CATV's. On the other hand, if the services are ancillary, then that reason does not exist, and broadcasters should be permitted, and perhaps encouraged, to own CATV's. At the present time the Commission is deferring action on a large number of broadcast license renewals because the licensees also own CATV facilities. This action seems inconsistent with some of the positions adopted in these proceedings.

In any event, the present inquiry is too late because the Commission has already formed its opinion on this subject. I believe the Commission should make its investigation and conduct its inquiry before reaching its conclusions, rather than afterward. The documents issued today plainly show that the Commission and its staff have strong and fixed views regarding the subordinate place of CATV's in the mass communications system, and these views are not likely to be much influenced by anything that can be presented to the Commission in the course of the inquiry. Even if some Commissioners hold such views, it would seem to me to be more courteous, more productive and more wise to refrain from officially promulgating them until the formal "inquiry" has been completed.

In any event, I cannot agree that it is proper for the FCC to determine, either directly or indirectly, which programs shall be carried by a CATV system. It seems to me that the basic issue is whether the Commission should employ economic and engineering rules in order to achieve economic and engineering objectives, or should exert direct control over the substance of programing in an effort to achieve its objectives. The method of selective program control, which the majority adopts here, will beget future problems and more control. Problems will arise because of delay, changes in plans for broadcasting of particular programs, the requirements of section 315 and "fairness," and section 317, and other provisions, to pose only a few examples that can readily be foreseen of the numerous problems likely to arise under this rule. Suppose that a local station advises a CATV that the latter cannot carry some program because the station intends to carry it, and then the station, for whatever reason, does not carry the program? As a practical matter, the CATV will not have any other opportunity to carry the program once the date of its broadcast has passed. Will the FCC then require the local station to carry this program? Will that depend upon the Commission's determination of the value of the particular program? We know from experience that documentary and political programs are those most likely to be delayed or omitted. Will the Commission permit these programs to be taken off the CATV at the whim of the local station owner without insuring that he does carry them? It seems unlikely to me that the majority will be willing to do this. However, I doubt that those broadcasters who now clamor for a Commission rule on nonduplication will welcome this new grounds for Commission regulation of their programing.

Even more provocative questions are posed with respect to political programing. Suppose a distant station, carried on a local CATV, is carrying a series of political programs on a presidential election which is balanced as between the major parties. A local station decides to carry those network programs presenting the views of one of the two major parties. It notifies the CATV which then blanks out these programs on its circuits. The local station will then have to balance out its own programing by presenting the views of the other major party over its broadcasting facilities. But the programs of the distant station carried on the local CATV will be unbalanced since they will present only the programs presenting the views of one party. Most important, the local public will then have an unbalanced presentation since it will have the programs favoring one party presented over two stations on the local system, whereas the programs favoring the other party will be presented over only one of the local channels and there will be only half as many of the latter. This is obviously a device that could easily be used to give the public a very biased political presentation during a campaign. Is the FCC then going to supervise CATV systems to see that their programs comply with all of the requirements of section 315 and "fairness"? How will this be accomplished? Will the FCC require program origination by CATV's? These and a host of other problems flow directly and inevitably from the approach adopted here. To say that any single situation is unlikely is not an adequate response. The records of the FCC and its own attempts to influence programing are eloquent testimony that situations such as those suggested, and others more bizarre and unusual, do occur and recur.

It should be noted that the rules now adopted by the Commission are based, in significant part, upon its concern for the preservation of "local live" programing, and that the notice of inquiry suggests that the protection which the Commission is now bestowing upon broadcasting stations is likely to be "accompanied by a concomitant duty on the part of the station" to provide "local live" programing. (See notice of inquiry, par. 53.) Thus, the nonduplication rule is not only a direct intrusion into the programing area through control of CATV's, but is also another argument to buttress the case for further Commission control of the programing of broadcasters. Believing as I do, that the Commission should not seek to control program content in the field of broadcasting, I am opposed to this approach. See separate opinions in *Lee Roy McCourry*, 2 R.R. 2d 895 (1964); *George E. Borst et al.*, FCC 65–207 (1965); The Role of Law in Broadcasting 7 J. of Bdcsting. 113 (1964); Religious Liberty and Broadcasting, 3[illegible] Geo. Wash. L.R. (March 1965).

One practical factor that seems to be left out of consideration in the adoption of a nonduplication rule is that this is the approach which is most likely to provide incentive, if not virtual necessity, for CATV's to undertake the origination of their own programs. The operation of the nonduplication rule means that the CATV operators are required to delete material from the programs which they receive and deliver to subscribers and it also means that when such material is deleted the CATV is left with a vacant channel. While the economi

pressures and motivations will undoubtedly vary from situation to situation, this kind of situation provides both the opportunity and incentive for program origination; and therefore, in the long run, is likely to engender more competition for the local television stations than it avoids. It seems to me to be far more simple and effective, not to mention wise and appropriate, to require that CATV's shall carry local stations, that they shall not alter or degrade the signals that they carry and that they shall meet such other engineering requirements as may be found appropriate, and to leave determination of programing to the broadcasters without forcing the CATV operators into the area of program selection and encouraging them to enter the area of program origination.

The most important and fundamental legal objection to the present Commission action is its lack of adequate jurisdictional basis. The rule promulgated by the Commission at this time undertakes to regulate the programs that may be carried by CATV's by requiring common carriers that serve the CATV's to impose upon their customers, as a condition of service, the limitations contained in the Commission rules. The Commission has repeatedly rejected this basis of jurisdiction in the past, as appears from the cases cited and quoted below. But regardless of lack of support in precedent or statutory language, the logical implications of this approach should warn of its unsoundness. If the Commission can impose its will on a person or business entity, that is the customer of a common carrier, by the simple device of requiring the common carrier to act as the Commission's policeman in order to keep its license, then the Commission can regulate any business in the United States. Every business and most citizens are customers of the telephone and telegraph companies. It has never previously been suggested that this fact subjected them to regulation by the FCC. But if today's decision stands, then that is the law. The Commission need no longer be constrained by any technical limitations on its jurisdiction arising from statutes enacted by Congress, if this theory is sustained by the courts. The rule adopted by the Commission today applies to CATV's served by the telephone company as well as to those served by CATV relay companies. But there is nothing in the logic of the Commission's jurisdictional approach that limits this technique to CATV's. If this jurisdictional foundation is sound for CATV's, the Commission may, by precisely the same technique, impose its regulations on theaters or newspapers, on stockbrokers or taxicabs, indeed on any business or person that needs and uses the services of a communications common carrier.

The Commission's assertion of direct jurisdiction over companies that receive broadcast signals and transmit them wholly by wire within a single State, without any specific statutory foundation, is equally alarming in its implications. The principal argument urged in support of the Commission's jurisdiction over such companies is that it is desirable for the FCC to have such jurisdiction in order to attain the broad general objectives of the Communications Act. However, if this reasoning is sound, then the jurisdiction of the Commission is literally unlimited. There is scarcely any aspect of organized social living that is not in some way related to the complex ramifications of

the communications system that is now under the jurisdiction of t
Commission. If the Commission has authority to deal with any
tivities which "threaten to impede realization of the Commissio
* * * plan and policies" (memorandum on jurisdiction) then it c
control all amusements, the field of journalism, the scheduling of mo
ments by trains, planes, and ships, not to mention almost any oth
activity that is either competitive or ancillary to or an important us
of communications. Such vague and broad reasoning simply will n
sustain jurisdiction as to activities not plainly within the scope of so
more specific statutory language. See *F.P.C.* v. *Panhandle Co.*, 3
U.S. 498 (1949).

When the Communications Act itself is examined it is found th
not only is language lacking to give the Commission jurisdiction whi
it undertakes to assert here but the language of the statute expres
denies that jurisdiction.

Section 1 of the act, 47 U.S.C. 151, states the purpose of the act
most general terms and states that the FCC is created pursuant
this purpose. However, it does not define or confer any jurisdicti

Section 2 of the act, 47 U.S.C. 152, says in its first subdivision th
"the provisions of this chapter shall apply to all interstate and forei
communication by wire or radio * * *." It does not state that t
Commission has jurisdiction over all such communication. Rather
describes in general terms the scope of the act and the outermost lin
tations of its application. However, it says that within these out
most limits the act applies pursuant to its provisions. In other wor
in order to find jurisdiction within the scope described by the fi
subdivision of section 2, it is necessary to find some specific provisi
of the act conferring jurisdiction.

This is emphasized by the second subdivision of section 2, whi
specifically says that nothing in the act shall be construed to give t
Commission jurisdiction with respect to "intrastate communicati
service by wire or radio of any carrier" or "any carrier engaged
interstate or foreign communication solely through connection
radio, * * * with facilities located in an adjoining State * * *
another carrier * * *." It would seem that the latter clauses speci
cally exclude both CATV relay companies and CATV's from t
jurisdiction of the Commission when they do not use microwa
However, it is argued that the intrastate relay companies using wi
rather than microwave, are connected by radio with *broadcasters*
another State rather than with *carriers* in another State. The obvio
answer is that at the time of enactment of the Communications A
such things as CATV's were unheard of and that the intent of Congr
expressed in the second subdivision of section 2 is to deny the Comm
sion jurisdiction over intrastate carriers which are not part of a sing
integrated system and which simply carry signals emanating fr
another State. The congressional intent to exclude the Commissi
from regulation of intrastate facilities and operations is indicated
a number of provisions in the Communications Act. In addition
the restrictions of 47 U.S.C. 152(2), a statutory denial of Commissi
jurisdiction to regulate intrastate facilities or operations appears
47 U.S.C. 214 as to communications common carriers, in 47 U.S.

221(b) as to telephone companies, and even in 47 U.S.C. 301(d) as to radio signals which do not have a direct effect on interstate communications.

However, it is not necessary to rely upon inferential construction. Examination of the entire Communications Act for a specific provision applicable to companies engaged in transmitting signals intrastate by wire discloses that only section 214, 47 U.S.C. 214, is applicable. This section provides that no carrier shall construct or operate a line without obtaining authority from the Commission provided, however, that no authority from the Commission is required for the construction or operation of "a line within a single State unless such line constitutes part of an interstate line." The section further provides that, "As used in this section the term 'line' means any channel of communication established by the use of appropriate equipment other than a channel of communication established by the interconnection of two or more existing channels * * *." Thus, by specific statutory provision, the mere fact that a CATV system or relay company is connected by radio to some other communications facility does not constitute its lines a part of a channel of communication comprising both the out-of-State facility and the intrastate facility. The company which operates by wire within a single State is, therefore, specifically excluded from Commission jurisdiction by section 214. By familiar rules of statutory construction such a specific and explicit exclusion prevails over any inference that might otherwise be spun out of more general language that is claimed to imply jurisdiction.

The Commission memorandum on jurisdiction argues from the definitions of "wire communication" and "radio communication" in 47 U.S.C. 153, to the conclusion that the Commission has jurisdiction over CATV's because their activities may be said to come within the scope of these definitions. This argument is wholly beside the point. The section on definitions confers no jurisdiction at all. Many terms are defined in that same section, including the terms "United States," "person" and "State commission." It is obvious that the FCC does not have jurisdiction over the United States, over State commissions or over all persons. The terms defined have legal significance only to the extent that they are used in other sections of the statutes. But one will search the act in vain for any section which expressly confers jurisdiction upon the Commission in the broad terms mentioned in the memorandum on jurisdiction. Consequently, the definitions given those terms are not germane to the issue.

If the argument in the Commission's memorandum is correct, then the Commission has jurisdiction not only over intrastate wire relay systems and CATV operating systems but also over television and radio receivers. The argument made in the Commission memorandum is that any instrumentality which is incidental to or used in the process of transmitting picture or sound or which forms a connecting link in the chain of communication between the transmitting station and the viewing public is subject to Commission jurisdiction. Television and radio receiving sets are just as much within this jurisdictional concept as CATV's and broadcasting stations. In that event the "all channel law" (Public Law 87-529, 47 U.S.C. 303(s)) was unnecessary as the

Commission had full authority to regulate and license receivers by the terms of the original Communications Act. Clearly, neither the Commission nor the courts have ever previously thought this to be the case. Both have continuously acted on the contrary assumption.

The Commission itself has explicitly denied its right to control and its jurisdiction over CATV's in several decisions which up to the present time have not been specifically reconsidered or overruled. The first reported decision is *Intermountain Microwave*, 24 FCC 54 adopted January 30, 1958. In this case, a television broadcaster, Hill County, objected to the grant of a microwave authority to a CATV relay company. The Commission opinion said:

> Hill County is seeking to have the Commission deny a radio authorization to a communications common carrier because the communication circuit to be derived under such authorization will be utilized by subscribers who are competitors of Hill County in endeavoring to provide visual entertainment * * *. We are of the opinion that the request of Hill County must be denied. * * * In considering this problem, it must be remembered that it is possible and feasible for communications common carriers to provide program relay facilities to subscribers where no special authorization is required from this Commission, e.g., where the carrier already has in place properly authorized general cable, wire, or radio facilities which may be put to such particular use in the ordinary course of business. Thus to single out for special consideration and denial only those situations where new construction is involved, where such new construction is specifically for the purpose of providing a service to the public, when the initial or sole user availing himself of service is a community television distribution system would be arbitrary, capricious, and discriminatory. An alternative, of course, would be to adopt an overall policy, rule, or condition with respect to every cable, wire, or radio authorization, issued by this Commission to carriers under its jurisdiction, under both title II and title III of the Communications Act, prohibiting the rendition of the specific type of service here under attack by the objectors. Such a procedure would be equally arbitrary, capricious, and discriminatory and unwarranted in view of our ultimate determination herein.

A few months later, in *Frontier Broadcasting Co.*, 24 FCC 251, 16 R.R. 1005 (1958) the Commission specifically pointed out that even if it held CATV systems to be common carriers they would come within the scope of section 214 of the Communications Act and, therefore, would not require Commission authority to construct or operate interstate lines. The Commission further said that when CATV systems transmitting signals by wire do not emit excessive radiation they involve no radio transmission which requires any form of license from the Commission under the act.

Thereafter the Commission conducted an extensive inquiry and after plenary proceedings entered a report and order considering the whole subject of CATV and repeater service, 26 FCC 403, 18 R.R. 1573 (1959). The following are some of the conclusions then reached and stated by the Commission:

> * * * we find no present basis for asserting jurisdiction or authority over CATV's except as we already regulate them under part 15 of our rules with respect to their radiation of energy. (Par. 71.)
>
> * * * it would *not* constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization for common carrier microwave, wire, or cable transmission of television programs to CATV systems on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations. (Par. 77.)

> Certainly, with respect to anything more than the barring of simultaneous duplication, we believe this to be an unwarranted invasion of viewers' rights to get "live" programing if they are willing to pay for it. The suggested rules restricting presentation of the programs of the local station's network would appear to be cumbersome, if not completely unworkable, especially considering that many stations in small markets, including some of those covered in the record, present programs of two or even three networks. (Par. 96.)
>
> We have considered herein the problem, the issues raised, and suggested methods of solution. Two of the broadcasters' suggestions, both relating to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. *Since both of these steps require changes in the Communications Act*, we will shortly recommend to Congress appropriate legislation, as indicated above. (Par. 99; emphasis added.)

In 1962 the Commission, with one dissent and one abstention, issued the *Carter Mountain* decision, which is the principal reliance of those who now argue for FCC jurisdiction in this matter. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962). In this case a CATV relay company applied for authority to transmit television signals by microwave to a small community with one local television station. The television station protested the application and a hearing was held. On the basis of a complete evidentiary record the Commission found that a grant of the microwave authority to the relay company with the bringing of CATV service to the community would result in the demise of the local television station. It, therefore, found that a grant of the microwave authority would not be in the public interest. The Commission stated that the two basic issues in the case were whether the relay company was a bona fide common carrier and whether the economic impact of the grant was of legal significance or the public interest was inherent in the fact that applicant was a common carrier. The Commission held that economic impact of the proposed grant on the broadcasting station was of legal significance and was adequate ground for denying the authority sought. The holding was explicitly limited to this. The Commission said in its opinion: "There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant." The Commission did not consider or discuss the decisions cited above and the only comment in *Carter Mountain* on the earlier decisions is this: "To the extent that this decision departs from our views in the report and order in docket No. 12443, 26 FCC 403 (released April 14, 1959), those views are modified."

The decision was appealed and affirmed by the court of appeals. In the court of appeals, six issues were agreed upon between the parties and submitted to the court by stipulation. These are set forth in the appellate opinion. *Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951 (1963). None of the issues related either to the imposition of conditions upon or control over the programs to be carried by the applicant or to the possibility of extending FCC jurisdiction to companies not utilizing radio trans-

mission for the carriage of signals. In fact, the Commission in its brief to the Supreme Court in opposition to certiorari, specifically stated that no question of Commission jurisdiction over CATV's operating by wire was involved in that case. The brief stated "* * * several bills have been introduced in Congress to give the Commission direct authority over CATV's, *a question not involved here*, * * *" (FCC brief, p. 10; emphasis added).

A month after issuing its *Carter Mountain* decision, the Commission issued a unanimous order in *WSTV, Inc.* v. *Fortnightly Corp.*, 23 R.R. 184 (1962) in which it relied upon and reaffirmed the holding of the *Frontier Broadcasting* decision, and reiterated that "this Commission [is] without title II jurisdiction over the CATV systems." Accordingly, the Commission ordered that the complaint by a broadcaster against a CATV system "is dismissed for failure to state a cause of action within the jurisdiction of the Commission."

In the report and order adopting rules to be imposed on CATV's through the common carriers which serve them, the Commission merely mentions the matter of jurisdiction in a footnote (footnote 5). This cavalier reference relies entirely on the authority of the *Carter Mountain* case as the legal foundation for jurisdiction to issue the rules. But this reliance is wholly misplaced. The *Carter Mountain* decision held only that the Commission could wholly deny a common carrier application when the sole proposed use of the common carrier was to serve a CATV and such service would, on the facts of record in that case, result in the economic destruction of a local broadcasting station. The issue of Commission authority to impose conditions on or control the character of the signals carried by the relay company, not to mention the customer, was not raised or decided in that case, was not considered by the Commission (see par. 3, 32 FCC 460) and, in fact, was expressly disclaimed by the Commission (par. 8, 32 FCC 462). The Commission did say that its denial of the application was without prejudice to the right of applicant to file a new application when conditions had changed so that the operation of the CATV would not have the impact on the local television station which the record there demonstrated was likely to follow in circumstances prevailing at the time of the decision. However, this is a far cry from a holding that the Commission can impose conditions as to the signals to be carried by the communications carrier or by its customer. As noted in the preceding discussion, the Commission told the Supreme Court in the *Carter Mountain* brief that the issue of FCC jurisdiction over CATV's was *not* involved, and shortly after the *Carter Mountain* decision a unanimous Commission reaffirmed that it did *not* have jurisdiction over the carriage of signals by CATV's. There is no reasoned Commission opinion that considers this issue and concludes that the Commission does have the jurisdiction actually exercised in the instant report and order. Several Commission opinions hold to the contrary. In these circumstances, the casual disposition of the jurisdictional issue in a footnote seems inadequate at best and irresponsible at worst.

The Commission memorandum cites cases like *American Trucking Assn.* v. *U.S.*, 344 U.S. 298, and *NBC* v. *U.S.*, 319 U.S. 190, to sustain

jurisdiction. However, the point at issue in those cases, and others like them, was simply whether a regulatory agency having jurisdiction over a field of activity and an enterprise within that field could act with reference to a particular practice not specified in the basic statute. The Supreme Court held that, regardless of the absence of specific reference to a particular practice in the act, the regulatory agency having jurisdiction of the field and the enterprise might promulgate regulations dealing with a practice which was considered to be an evil requiring correction. The Court points out that the necessity of formulating regulations to meet specific practices not foreseen by Congress is precisely one of the reasons regulatory agencies such as the Commission are created. However, this reasoning has nothing whatever to do with an issue as to the existence of jurisdiction over an economic or technical field or a particular enterprise.

A case much closer to the present situation than any cited in the Commission's memorandum is *F.P.C.* v. *Panhandle Co.*, 337 U.S. 498 (1949). In that case the Supreme Court held that the FPC could not extend its power by the kind of reasoning relied on by the FCC here, even though the FPC was seeking to regulate a company concededly within its general jurisdiction but as to an aspect of the company's business that was not within the terms of the statutory jurisdiction. The Court said, inter alia:

> Nothing in the sections indicates that the power given to the Commission over natural-gas companies by section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.
>
> Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production * * *. We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.

The Court stated that if the Commission were of the opinion that it should have the power sought, then it was authorized to call the attention of Congress to that fact. The reasoning adopted by the Court in the *Panhandle* case applies with even greater force to the FCC in the instant situation. Here there is not merely an inference from earlier inaction that the Commission did not believe it had the power now asserted. Here there are clear and explicit declarations by this Commission that it does not have the power which the present majority of the Commission now claims. The only thing that has changed since the Commission last disclaimed the jurisdiction it now asserts is the personnel of the Commission. That is not a proper basis for disregarding precedent and changing established legal principles. See my separate opinion in *Assignment of Additional VHF Channel to Johnstown, Pa., etc.*, 1 R.R. 2d 1572, 1580 (1963).

Contrary to the apparent belief of the Commission majority, the fact that it might be thought desirable for the FCC to have control

of CATV's or their practices does not indicate that the agency does possess such power. See *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952). Despite some reservations as to the wisdom and objectivity of the Commission and its staff regarding CATV's, I would agree that, as a matter of principle, the FCC should have the authority to regulate CATV's as a service closely related to broadcasting. I favor and will support appropriate congressional legislation to give the Commission jurisdiction in this field.

This position differs from the assertion of jurisdiction made by the Commission in the instant proceedings in several important respects. First, it is founded on a deferential respect for the constitutional scheme by which Congress must specifically delegate power before it is exercised by an agency created by Congress. Second, the power that Congress delegates is almost certainly going to be specified and limited in extent, whereas the power derived by inference from broad general statutory terms is unlimited except by the self-restraint of the Commissioners and the vigilance of the courts. Finally, it is likely that congressional hearings will illuminate this problem and that Congress will provide some guidance to the Commission that may suggest a better course that the one the Commission is now determined to follow.

At least part of the problem that the Commission now foresees in the proliferations of CATV's is the result of the Commission's own past policies. In the past the Commission has adopted the same restrictive attitude toward translators and other auxiliary services that were within its jurisdiction that it now proposes to take toward CATV's. The popular demand which has been responsible for the recent rapid growth of CATV's has been largely the result of the denial of service to many areas because of the FCC strictness and reluctance in granting authority for the construction and operation of translators and boosters. Apparently the Commission has not yet learned that the expansion of service is not to be attained by the limitation of competition and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation. The Commission can do many things to stimulate and encourage the extension and expansion of television service throughout the country, but regulating the programs that can be brought into homes by CATV's and extending the Commission's jurisdiction without specific congressional authority are not likely to help.

However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcasters, the CATV's, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great Government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents

the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific congressional authority.

III

SECOND REPORT AND ORDER

* * *

Separate Statement of Commissioner Lee Loevinger Re Second Report and Order in CATV Proceedings

I concur in the substantive provisions of the order but I cann join in the opinion or agree that the Commission has the jurisdictic which it now asserts.

The opinion (here called "second report") which purports to su port the present order seems to me to illustrate many of the wor aspects of the institutional decision. The opinion does not reall rationalize or justify the result reached, but rather accepts it som

what grudgingly. This is a product of the fact that the opinion wa originally drafted by the staff to support an entirely different result Despite the efforts and instructions of the Commission, and a serie of revised drafts, the instant opinion is substantially similar to th document which was written to support a different result. The opin ion refers to little evidence and much of that is inconsistent, assump tions and speculation substitute for facts, the reasoning is circuitou and illogical, and the statement is so turgid and prolix that it doe more to obscure than illuminate the subject. I can concur fully onl in paragraphs 97, 98, 150, and 156 to the extent of my concurrence i the order.

What the Commission is doing in the instant order is to exercis its quasi-legislative powers. Consequently the decision to issue o join in the instant order is a legislative judgment. I concur in th substantive provisions of the order not because I think it is wholl logical or the best method of dealing with the subject, but because i seems to me to be the best and most reasonable proposal that has an practical chance of securing approval by a majority of the Commis sion. This is, in my opinion, a legitimate basis for making a legisla tive judgment.

On the other hand, the assertion of jurisdiction is a legal matte that requires a legal judgment. Nothing has appeared or occurre since the previous Commission statement on this subject that furnishe any basis for reaching a different conclusion as to jurisdiction tha the one set forth in my prior opinion. (38 FCC 683, 746 (1965). Accordingly I adhere to that opinion and to the conclusions state there.

The Commission rule requiring a hearing before CATV is permitte to commence operation in any of the 100 largest markets is particularl questionable. The ostensible justification is that CATV might be come pay-TV. This reason is flimsy, since that danger—if it is danger—could be met much more easily by less burdensom requirements.

Nevertheless the substantive position now adopted by a majority o the Commission seems to me to be the most moderate and reasonabl compromise of sharply conflicting views and positions that has an practical chance of approval. It is of the greatest importance tha the Commission now recognizes the necessity of requesting Congres to legislate on jurisdiction and other important aspects of this matte and has done so. In these circumstances, I think the most constru tive and useful course is to support affirmative action by the Commis sion, leaving the jurisdictional issue to decision by Congress and th courts, and looking to Congress for further guidance as to regulator matters. Accordingly I concur in the substantive provisions of th legislative rules now promulgated by the Commission. 2 FCC2

IV

MEMORANDUM OPINION AND ORDER IN DOCKET NOS. 14895 AND 15233 AND 15971, ADOPTED MAY 25, 1966

(On Petition for Reconsideration of Second Report and Order)

Dissenting Statement of Commissioner
Robert T. Bartley

I dissent. I would grant the petitioners' requests to stay the effectiveness of the Commission's CATV rules pending action on their petitions for reconsideration, until final adjudication of appeals from the second report and order, or action by Congress, whichever should occur first.

I disagree with the Commission's finding that there is little likelihood of petitioners' prevailing.

There are presently six bills pending in Congress with respect to regulation of CATV, H.R. 7715, H.R. 12914, H.R. 13286, H.R. 14201, H.R. 14454, and S. 3017. Hearings have been held on four of these

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bills by the House Interstate and Foreign Commerce Committee (H.R. 7715, H.R. 12914, H.R. 13286, and H.R. 14201).

I believe it is unsound to second-guess the Congress, and now conclude that no changes will be made in the Commission's proposed bill, H.R. 13286. With substantive changes or enactment of a different bill, the Commission's present CATV rules could be nullified.

Moreover, in face of serious questions as to the Commission's having jurisdiction over CATV and validity of the rules recently promulgated, there is no certainty that the rules will be upheld in pending court appeals.

In my opinion, the Commission does not presently have jurisdiction over CATV and, consequently, the rules are invalid for this and other reasons set forth in my dissent to the Commission's decision in docket No. 16551, which dissent is incorporated herein by reference and attached hereto.

I vote to stay the effective date of the rules until their validity has been finally adjudicated by the courts or until Congress has enacted CATV legislation. 3 FCC 2d 827-28

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, arguendo, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication "except as otherwise provided by the agency upon good cause found and published with the rule."

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retrospectively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rule making without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional. 3 FCC 2d 827-829

V

MEMORANDUM OPINION AND ORDER IN DOCKET NOS. 14895, 15233 AND 15971, RM 1701 AND RM 1025, ADOPTED JANUARY 5, 1967

* * *

Dissenting Opinion of Commissioner Lee Loevinger

(On Reconsideration of CATV Rules, Dockets Nos. 14895, 15233, and 15971)

The Commission is now issuing an opinion and order in a group of related CATV rulemaking proceedings, the effect of which is to refuse to reconsider or change (except in some minor details) the CATV rules announced on February 15, 1966, and issued on March 8, 1966. In view of the probability of congressional consideration and action in the present session of Congress, this result is not unreasonable, and I would be inclined to concur were it not for the accompanying opinion. The opinion which the Commission is issuing is a typical institutional product which has had very slight Commission-level consideration or analysis. It is composed mainly of institutional cliches, but the implications of the reasoning now given Commission approval are sufficiently drastic and extensive to warrant more detailed analysis. My main objections are three:

First, the opinion asserts Commission jurisdiction which is self-bestowed and unlimited;

Second, the opinion fails to come to grips with either the issues or the facts and rests on semantic confusion and superstition;

Third, contrary to the express representations made by the Commission in this matter, the effect of the rules as now construed is to impose a freeze or prohibition on technological development and economic expansion in this field.

The position now taken by the Commission on jurisdiction is a prime example of lifting oneself by one's own intellectual bootstraps. Reduced to its barest elements this intellectual bootstrapping operation consists of asserting jurisdiction without statutory authority or precedent, refusing to hear argument regarding the position on the ground that the decision has already been made, and then proceeding to act on the jurisdiction asserted, pointing to one's own assertion and prior decisions as precedent and justification. If this characterization seems exaggerated, attention is invited to the actual course of events.

Federal regulation of radio transmission was instituted because "the radio spectrum simply is not large enough to accommodate everybody," radio transmitting stations were operating in such numbers and manner that there was chaos in the spectrum, and regulation of radio transmission was therefore "as vital to its development as traffic control was to the development of the automobile." *NBC* v. *U.S.*, 319 U.S. 190, 210–214 (1943). The Communications Act was passed in 1934 when television was still wholly experimental and CATV was unheard of. The basic function of the Commission and its basic authority, so far as relevant to this subject, was to license radio transmitting stations (47 U.S.C., sec. 151).

During the 1950's CATV and other ancillary television transmitting techniques developed and a demand was made that the Commission assert jurisdiction over them and regulate them. In 1958 the Commission instituted an overall "Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV

'Repeaters' on the Orderly Development of Television Broadcasting," docket No. 12443. After a year of inquiry, the Commission issued an extensive report and order, finding, without dissent, that it was without jurisdiction over CATVs. *CATV and TV Repeater Services*, 26 FCC 403 (1959).

A few years later the Commission held that it was authorized to deny a license to transmit television signals by microwave radio transmission to a small community with one television station, on the ground that evidence of record showed that the economic impact of the applicant's operation would drive the television station out of business. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), affd. 321 F. 2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951 (1963). In *Carter Mountain* the Commission did not consider its own prior decision and its only comment on that precedent was: "To the extent that this decision departs from our views in * * * 26 FCC 403 * * * those views are modified."

The next step in the expansion of jurisdiction was the issuance of a "Notice of Inquiry" on April 23, 1965 (FCC 65–334). This was ostensibly an inquiry into whether the Commission had authority to promulgate rules regulating CATVs and particularly nonmicrowave CATVs (i.e., those transmitting signals wholly by wire and not employing radio transmission). However, attached to the "Notice of Inquiry" was a memorandum from the Commission general counsel asserting that the Commission did have plenary authority over CATVs "whether microwave is used or not." On the basis of this memorandum, without further discussion or inquiry, the "Notice of Inquiry" asserted the conclusion that "CATV systems are engaged in interstate communications by wire" and are, therefore, subject to the Commission's regulatory authority (FCC 65–334, par. 29). Neither the Commission's notice nor the memorandum on jurisdiction so much as mentioned the prior Commission determination that it lacked jurisdiction, and the memorandum relied wholly on general language in the Communications Act unrelated to either a specific grant of jurisdiction or the kind of action proposed by the Commission. See opinion of Commissioner Loevinger, 38 FCC 746. To no one's surprise, the Commission concluded this inquiry by reaching the decision that it did have jurisdiction to regulate cable CATV (i.e., systems not using any radio transmission) as well as microwave CATV. *Second Report and Order*, 2 FCC 2d 725 (1966).

A few months later in implementing its CATV rules the Commission issued a cease and desist order, the effect of which was to put a small town cable CATV out of business. *Back Mountain Telecable Inc.*, 5 FCC 2d 735 (1966). A demand was made for oral argument before the Commission on constitutional questions involved in this assertion of Commission jurisdiction. The Commission summarily denied this request on the ground that the views expressed in the *Second Report and Order*, supra, "dispose of the questions raised," and, hence, "no purpose would be served by oral argument," despite the fact that a dissenting opinion pointed out that not only did the opinion cited not "dispose of" the constitutional issues, but it did not even consider or mention them.

In the present opinion the Commission considers the constitutional free speech issue for the first time, with the statement that it will treat this question "in greater detail"—presumably meaning "greater detail" than the complete absence of discussion in prior opinions. However, the present discussion is confined to citing *NBC* v. *U.S.*, 319 U.S. 190 (1943), and *Lafayette Radio* v. *U.S.*, 345 F. 2d 278 (C.A. 2d 1965), for the proposition that "reasonable regulation of radio transmissions, if consistent with the public interest * * * is not violative of the right of free speech," and then concluding that:

> * * * there is no reason why the free speech principles should apply differently to those CATVs which derive their signals off-the-air than to those which use licensed radio.

The *Lafayette Radio* case sustained Commission regulation of Citizens Band radio on the grounds that the *NBC* case held licensing required by the limited facilities of radio. In the *NBC* case, the Supreme Court met the specific argument of constitutional free speech in these words:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. *NBC* v. *U.S.*, 319 U.S. 190, 226 (1943).

It should be self-evident from the Supreme Court statement that, contrary to the position of the instant opinion, there is every reason "why free speech principles should apply differently" to those CATVs which do not use radio transmission and to those which do. The whole reason and rationale for Government regulation in this field is the physical necessity for establishing and maintaining technical standards and order so that radio transmission is possible. Further, the rationale of the *NBC* case is based squarely and solely on the necessity of denying access to radio transmission to some because of the limited space in the spectrum. It makes no legal, technical, or logical sense to say that a case holding regulation to be justified because of the "limited facilities of radio" transmission, also justifies the same regulation of cable transmissions.

Furthermore, even the Commission opinions, when they have addressed themselves to the issue of jurisdiction, have based the conclusion of jurisdiction on the assertion that cable CATV is "engaged in interstate communication by wire" (FCC 65–334, par. 29)—on the theory that the signals carried have crossed a State line before being picked up by the CATV and transmitted by wire. But in the *Back Mountain* case a Pennsylvania CATV system was picking up Pennsylvania television stations and transmitting their signals by wire to its customers in Pennsylvania. (Some New York signals were also carried, but this activity was clearly separable for legal purposes.) The Commission has not yet seriously discussed or considered the legal basis of jurisdiction to order cessation of operation by a CATV system which picks up signals from a station within the State of its situs and transmits these by cable to customers in the same State. (The problem is brushed off by casual reference, without discussion, in a footnote in

the *Second Report*, 2 FCC 2d 732, footnote 9.) However, it has entered cease and desist orders against such activities and has been willing to order some such systems out of business. See, e.g., *Back Mountain Telecable, Inc.*, 5 FCC 2d 735 (1966).

Thus, the Commission has bootstrapped itself into an assertion of jurisdiction over all CATVs without ever squarely defining, analyzing, and considering the issues, the legal basis of its jurisdiction, and the limitations of the jurisdiction asserted. By this intellectual bootstrapping operation the Commission has moved from a specific statutory authority to license interstate radio transmissions to the assertion of a self-bestowed power to regulate and prohibit the intrastate transmission by wire of programs originating, broadcast, and received within the same State. As authority the Commission relies on a Supreme Court opinion upholding regulation of interstate radio transmission by licensing because of its unique characteristic and blandly asserts that there is no reason why the same principles should not apply to communication that is not by radio and that has entirely different characteristics. As the jurisdictional issue has not yet been clearly defined, considered, or determined, it is by no means clear that there is a majority of the Commission in support of the jurisdiction that is in fact being exercised, but so potent and impersonal is the bureaucratic institutional process that actions taken without definition or consideration of issues or principles become precedents which provide their own rationalization and finally preclude the Commission from ever defining, considering, and thoughtfully determining their legal validity and implications.

The assertion of jurisdiction on such a basis as this should be a matter of concern, but the underlying process and rationale and the implications for the future are even more important. The closest the Commission has come to specifying a basis for the jurisdiction it is now exercising is in the *Second Report and Order*, 2 FCC 2d 725 (1966). It there discusses jurisdiction as a matter of law (pars. 8–19), and assertion of jurisdiction (pars. 20–46). The arguments under the first category boil down to the assertions that CATV systems "are themselves engaged in 'interstate communication by wire,'" and that there is no "bar to jurisdiction" (pars. 12, 19). Although the basis for asserting that CATVs are engaged in interstate communication by wire is not spelled out, it appears to rest on the fact that some CATVs receive radio broadcasts originating outside the State of situs and then transmit the programs thus received over wires within the State of situs. The jurisdictional discussion under the second category is devoted entirely to the effort to show that regulation of both microwave and cable CATV is subject to Commission regulation because "this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service * * *" (pars. 21, et seq.).

If such reasons are adequate to support jurisdiction, then there is no limit to the authority of this Commission. It is apparent at a glance that these reasons apply with even greater force to the great national television networks than to the CATVs. Yet the Commission

has so far given no indication of the fact that it has often disclaimed jurisdiction to regulate networks, and has asked Congress for such authority, which has so far been withheld. If the present position of the Commission is sustained, the Commission has plenary power to control networks by direct regulation without any other or further legislative action. This conclusion is hinted, though not expressly claimed, in a footnote in the *Second Report*, 2 FCC 2d 732, footnote 9. Before this conclusion is accepted complacently, it should be noted that the asserted jurisdiction is now being exercised in the CATV field to require the carriage of some programs and to prohibit the carriage of others.

The implications of the jurisdiction now being asserted go much further. The reception of a program originating outside the State and its transmission to customers by wire is said to constitute interstate communication subject to regulation. If a program is put on tape or film and thus transported across a State line, then transmitted by wire to customers within a single State, all of the grounds urged for jurisdiction apply equally, and there is no logical basis for differentiating this mode of communication from that now subject to the asserted jurisdiction. If this is so, it seems immaterial to the considerations most relied on by the Commission whether the recorded program is exhibited by transmission intrastate to a number of houses or exhibited to the public in one or a few theaters. So, by this reasoning, the Commission has jurisdiction over motion picture theaters—to be exercised as the Commission in its wisdom decides that the economic consequences of motion picture exhibition require in the public interest.

By similar reasoning it can easily be demonstrated that most news and feature material in newspapers come to the publisher through interstate communication by radio or wire. (Very few modern newspapers still rely on the pony express.) But since the Commission in effect holds that the precise mode of presenting the interstate communication to the public is immaterial, the fact that pictures and words are printed on paper and then distributed after being transmitted interstate will not be controlling. The Commission can cite the *NBC* case for the proposition that the first amendment does not prevent reasonable regulation in the public interest. Next the Commission will assert that "there is no reason why the free speech principles should apply differently" to newspapers than to radio merely because the situation involving the technical mode of communication is different—and the instant opinion stands for just this proposition. Thus, by its present course of reasoning, the Commission has jurisdiction to regulate newspapers—in the public interest, of course.

With far less ingenuity and disregard of logic than has been demonstrated by the Commission's opinions thus far, the asserted jurisdiction can be extended almost literally without limit. If it be objected that this reasoning is strained and untenable—which it is—then it must be answered that, assuming validity of the Commission's present assertion of jurisdiction, the extensions suggested rest on more cogent and coherent reasoning than that by which the Commission reached its present position.

The Commission, of course, disavows any present intention o claiming jurisdiction over newspapers, theaters, and other media o communications or other enterprises. But only a few years ago, th Commission was just as positively disavowing the jurisdiction whic it now asserts. It would take only a change of personnel or of view point—both of which are inevitable in time—for the Commission t assert the application of its self-bestowed jurisdiction to all mode of communication and entertainment.

I do not believe that Congress ever intended to grant or will i the future ever act to grant such a vague and limitless jurisdictio as the Commission now asserts and exercises. Even this cursor analysis should suffice to demonstrate that there is a strong prac tical, as well as legal, reason for insisting that the broad power o regulation should be confined within the jurisdiction specified b Congress in statutes, rather than left to be exercised at large by th hypothetical discretion of the institutional decision-making process

My second objection to the opinion is that it so clearly illustrate the most common inadequacy of the institutional decision-makin process. The opinion, like those that preceded it, simply fails t come to grips with either the issues or the facts and rests almos entirely on semantic confusion and superstition. The opinion sum marizes the provisions of the rules and the positions taken by th several petitions for reconsideration. Beyond this, the opinion re lies principally on the assertion that the results reached will serv the public interest. The public interest is referred to more tha 20 times, and serves as the main rationalization for the results reache regarding jurisdiction (pars. 4, 5, 8), regarding satellites (par. 10) regarding the use of grade B contours (pars. 13, 32, 33, 34), regardin nonduplication (par. 18), regarding the CATV freeze in major mar kets (pars. 23, 25), and regarding the use of grade A contours (par 30). The freeze in small markets, considered in more detail below is rationalized by invocation of the term "orderly" (par. 44).

It should take no great sophistication to understand that basin a decision on the bald assertion that it is required or implied b some high-order abstraction, such as "the public interest," "orderl procedure," or "the most desirable course," without specifying som concrete referents relevant to the case, is simply semantic super stition, equivalent to basing a decision on necromancy, astrology numerology, or tea leaf reading. It provides neither an explanatio of past actions nor a guide to future actions, and means no mor than that the decisionmaker has reached a result but cannot or wil not say why.

What constitutes a "private interest" in a given situation is often relatively clear—the monetary profit of an individual or corpora tion—although this term is not often used except as an ignoble con trast to the more honorific "public interest." But the public and private interests are by no means antithetical. On the contrary, it is the theory of our system that most often the public interest will con sist of allowing people to pursue their own private interests in thei own way. In any event, the "public interest" is not a single specific criterion, a definite operational standard, or a term of self-evident

eaning. The most extensive and scholarly attempt to analyze the ncept of "public interest" comes to the conclusion that

> * * * our investigation has failed to reveal a statement of public-interest theory that offers much promise either as a guide to public officials who are supposed to make decisions in the public interest, or to research scholars who might wish to investigate the extent to which governmental decisions are empirically made in the public interest. For either of the latter purposes, it would be necessary to have operational definitions of the public-interest concept; and neither my analysis nor that of other contemporary critics suggests that the public-interest theory prevalent in America today either is or is capable of being made operational * * *. It may be somewhat difficult for some readers to accept the conclusion that there is no public-interest theory worthy of the name and that the concept itself is significant primarily as a datum of politics. As such, it may at times fulfill a "hair shirt" function, to borrow Sorauf's felicitous phrase; it may also be nothing more than a label attached indiscriminately to a miscellany of particular compromises of the moment. Glendon Schubert, "The Public Interest," 220, 223 (1960).

An analysis of the public-interest concept in the light of Supreme ourt decisions and in the context of Government regulatory power aches essentially the same conclusion. Loevinger, "Regulation and ompetition as Alternatives," 11 Antitrust Bulletin 101, 129 et seq. 1966). In upholding the concept as a criterion of action for the Comission, the Supreme Court was at pains to point out that it was "not o be interpreted as setting up a standard so indefinite as to confer unmited power," but was to be interpreted by its statutory context, the ature of radio transmission and reception, and other factors. *NBC* v. *.S.*, 319 U.S. 190, 216 et seq. (1943). However, just as the Commission opinion has taken the Court's conclusion regarding the first amendent and applied it to precisely the kind of situation which the Court's pinion precludes by specific statement, so has it also taken the publicnterest criterion and converted it into a "standard so indefinite as to onfer unlimited power." At no point in the instant opinion or any ther opinion is there any indication of the necessity of specifying hat the Commission conceives the public interest to mean in concrete erms in a particular situation. It uses the phrase "public interest" as nothing more than a label attached indiscriminately to a miscellany f particular compromises of the moment."

The instant opinion leaves the reader without a clue as to whether he phrase "public interest" as used in support of the decision has any eaning at all. Could it mean conservation of usable space in the pectrum? Clearly not—for the activities which are forbidden and imited by the rules tend to conserve spectrum, and the activities which re protected and encouraged use large amounts of spectrum. Could t mean minimizing or avoiding electronic interference? Clearly ot—for the activities which are forbidden and limited cause no intererence, as they use no spectrum. Could it mean providing or encourging more diverse programs? Clearly not—for the best hope of teleision program diversity in many communities is probably through ATV, but the rules will favor a single television station over the iversity of a multichannel system if there is any economic conflict or ivalry between them. Does the public interest mean giving the public

what it wants or demands? Clearly not—for most of the rules and all of the cease and desist orders in this field are aimed at forbidding a service which a large segment of the local public is demanding and willing to pay for. Does the public interest mean to encourage experimentation and the development of new technology? Clearly not—for the principal purpose of the rules and the Commission actions under them is to limit and restrain the development of CATV as a new technology.

The only specific meaning that can be attributed to the phrase "public interest" as it is used in the Commission opinion is that it means protecting the private interest of broadcasters by limiting or suppressing any actual or potential competition by CATV.

Perhaps this objective can be justified in whole or in part. But it certainly has less sentimental appeal when plainly stated than when couched in the vague euphemism of "public interest," and also requires a good deal more by way of factual support, close examination, and logical analysis than the Commission has yet given the subject. Invocation of the pious phrase "public interest" may stir the emotions but it adds nothing to the intellectual argument and is merely a way of avoiding thought and cutting off debate. It does not have even the rationality of an appeal to divine guidance which was implicit in trial by compurgation, ordeal, and battle. To rest a conclusion on the justification that it "serves the public interest," without specifying concrete referents, is simply semantic superstition in contemporary terminology.

Finally, I object to the Commission's refusal to examine and consider the fact that the rules as now construed and in practical operation have imposed a freeze or prohibition on the development and extension of CATV service.

The CATV rules have been the subject of bitter controversy both in the industry and on the Commission since they were first proposed. In February 1966 the Commission met and the Commissioners agreed on a plan for the regulation of CATV systems which was set forth in a public notice dated February 15, 1966. This notice was not simply a press release but was the actual draft of the agreement among the Commissioners, and the text was carefully examined by the Commissioners as a precise statement of what the Commission had, in fact, agreed upon. This is made plain by the three statements accompanying the Commission notice, which state the personal concurrences and dissents on particular points of the Commissioners making the statements.

One of the principal purposes of the Commissioners in promulgating the February 15 compromise plan was to avoid a freeze on all CATV development and expansion, which had been previously urged upon them. This was done by providing in substance that in the top 100 television markets no CATV operation could be commenced or expanded without specific Commission approval, after a full evidentiary hearing and a finding that the potential effects of the proposed CATV operation would not be substantially competitive with any existing or proposed television stations, and that such an impediment would not be imposed outside the top 100 markets. On the latter point, the

specific language of the notice, which embodied the Commission action, was:

> The Commission's prior approval after an evidentiary hearing will not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings. However, the Commission will entertain, on an ad hoc basis, petitions from interested parties concerning the carriage of distant signals by CATV systems located in such smaller markets.

Three weeks later, on March 8, 1966, the Commission issued its institutional opinion and the text of the rules which were to effectuate the plan adopted February 15. The opinion and rules were more than 80 printed pages of small type (2 FCC 2d 725–808). The Commission issued another public notice announcing the adoption of these rules "to effectuate its plan for regulation of all CATV systems, as announced on February 15, 1966 * * *." The March 8 notice again summarized the provisions of the plan and the rules, and stated, in substantially the same language as on February 15, that (with exceptions immaterial here) no CATV operation could be commenced or expanded in the top 100 markets except with Commission approval after a full evidentiary hearing, and that no prior Commission approval or hearing would be required in smaller markets.

Since these rules were promulgated the institutional construction and application has converted the small-market rule into the equivalent of the rule applicable to the top 100 markets. That has occurred in this manner. The Commission plan, and the rules, provided that CATVs could commence or expand operation in the smaller markets without Commission approval but that any interested person could file an ad hoc petition in any situation and that the Commission could impose additional or different requirements than the rules (47 CFR, sec. 74.1109; 2 FCC 2d 725, 805). This has now been construed to mean that where a petition is filed to impose additional requirements upon, or prevent the operation of, a CATV system in a market smaller than the top 100, the CATV cannot commence or expand operations until it has a specific order of approval from the Commission. In plain language, the mere filing of a petition under section 74.1109 operates to impose an absolute and indefinite injunction against commencement or expansion of any operation by any CATV. Thus, any place and any time that there is any licensee, permittee, applicant, potential applicant, competitor, or other interested person who desires to stop the operation of a CATV system, he is given full power to do so by the present Commission rules. The mere filing of a petition, regardless of its form or merit and without any review or examination by the Commission, suffices to impose a complete prohibition against operation of the CATV system involved.

Thus, the compromise plan of February 15, which was adopted to avoid a freeze of CATV development, turns out to be a compromise in form and words only. No operation can be commenced or expanded in the top 100 markets until after the lengthy and arduous process of an FCC evidentiary hearing has been completed—which inevitably requires several years at least. No operation can be commenced or expanded in any other market if anyone objects. In the top 100

markets the freeze or prohibition operates automatically and regar
less of objection. In all other markets the freeze or prohibition must
invoked by some objection. But in practice there is no lack of o
jectors. So the Commission has—albeit unintentionally and unkno
ingly—in practical effect imposed a freeze on CATV development
expansion in all markets, with only a slight procedural differentiati
between the top 100 markets and the smaller markets, despite its e
press disclaimers of such action in the public notices of February
and March 8. This result the Commission now recognizes and affirm
on the grounds that it is "more orderly" (par. 44). Needless to sa
this verbalism is no more meaningful than the more favored "publ
interest."

While I agree with Commissioner Bartley that the status quo
this area is so unrealistic that it should be discarded, I might be i
clined to concur in an opinion and order that did no more than mai
tain the present rules on the ground that congressional action m
be expected to provide guidance to the Commission in the near futur
However, the present opinion has the form of a discussion of the merit
but without factual or logical substance. The history of the develo
ment of the Commission position on this subject, first as to jurisdictio
and, more recently, as to the imposition of a general freeze, is suc
that no one can surmise, much less predict, from the semantic confusio
and opacity of the instant opinion, what the Commission may do
the future.

Perhaps the Commission should not attempt to regulate CATVs
all. Perhaps the Commission should prohibit CATVs altogethe
Perhaps the Commission should attempt to write some clear and co
sistent rules to insure that CATVs will provide the public with bett
and more diverse program service than the public would get in th
absence of CATV. Perhaps a revision of the copyright law or
section 325 of the Communications Act to give proprietary rights
program originators is the best approach to this field. The only thin
that is quite clear to me is that there is no hope of finding a ration
and practical course until the Commission climbs out of the intelle
tual morass and dispels the semantic fog in which this subject is no
lost.

APPENDIX—B

Legislative History of Proposed Amendments to the Communications Act, Conferring Jurisdiction over CATV

I

After lengthy hearings on September 5, 1959, during the 86th Congress, First Session, the Committee on Interstate and Foreign Commerce submitted Senate Report 923 accompanying and recommending passage of Senate Bill S. 2653, entitled "A bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over Community Antenna systems." The bill provides as follows:

> That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by inserting at the end thereof the following: "(hh) 'Community antenna television system' means any facility performing the service of receiving and amplifying the signals transmitting programs broadcast by one or more television stations and redistributing such programs, by wire, to subscribing members of the public, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises, or (3) any such facility used only for the distribution, by wire, of programs for which a charge is imposed generally on all subscribers wherever located and which are not in the first

instance broadcast for reception without charge by all members of the public within the direct range of television broadcast stations."

Sec. 2. Section 3 (h) of the Communications Act of 1934 (47 U.S.C. 153) is amended to read as follows:

"(h) 'Common carrier' or 'carrier' means any person engaged as a common common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna television system shall not, insofar as such person is so engaged, be deemed a common carrier."

Sec. 3. Title III of the Communications Act of 1934 (47 U.S.C. 301 and the following) is amended by inserting therein a new section 330 as follows, entitled:

"COMMUNITY ANTENNA TELEVISION SYSTEMS

"Sec. 330. (a) No person shall operate a community antenna television system except under and in accordance with this Act and with a license granted under the provisions of this Act: *Provided*, That a Community antenna television system which is in operation on the date of the enactment of this section may continue to operate until the Commission issues a license therefor: *Provided further*, That any system continuing to operate in accordance with the foregoing shall, not later than one hundred and twenty days after such enactment, submit an application for a license containing all the information required by the Commission to be submitted with such application.

"(b) (1) The provisions of sections 303, 304, 307, 308, 310, 311, 312, 313, 315, and 316 relating to stations, radio stations, broadcasting stations, licenses therefor, licensees thereof, and station operators shall apply also to community antenna television systems, licenses therefor, licensees thereof and operators thereof.

"(b) (2) The provisions of section 317 relating to matters broadcast by any radio station, and section 326 relating to radiocommunications shall be deemed to apply also to all matter distributed to its subscribers by a community antenna television system.

"(b) (3) The provisions of section 319 relating to construction permits shall apply also to the construction and licensing of a community antenna television system: *Provided,* That the Commission, if it finds that the public interest, convenience and necessity would be served thereby, may waive the requirement of a permit for such construction.

"(c) The public interest, convenience, and necessity will be deemed to be served by the grant of an application for a license for the provision of existing program services by a community antenna television system which was in operation on the date of the enactment of this section subject to such conditions as the Commission may impose under subsection (d) hereof.

"(d) (1) Either prior to or within thirty days after the grant of an application for a license or a renewal thereof for a community antenna television system which was in operation on the date of the enactment of this section, the licensee of a television station assigned to a community in which such community antenna television system serves subscribers may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued

operation of a television station which is providing the only available locally originated television broadcast program service.

"(d) (2) Such petition shall describe, in detail, the proposed operating conditions, and shall set forth, with particularity, the material effect of the proposed conditions on such continued television station operation. The community antenna television system shall be afforded an opportunity to respond to such petition within thirty days after public announcement of the filing thereof. After the expiration of such thirty-day period, the Commission shall determine whether the petition meets the foregoing requirements, and, if it does, shall determine whether, with due regard to service rendered by the community antenna television system and by petitioner's station, the public interest, convenience and necessity would be served by the adoption of the proposed or any other operating conditions. Public evidentiary hearings shall be held thereon if requested by either the petitioner or the community antenna television station within thirty days after public ammouncement of such determination, or if ordered by the Commission on its own motion prior to its determination.

"(d) (3) Any community antenna television system license issued under subsection (c) above shall be subject to conditions imposed in accordance with this subsection but any such license so issued shall not be stayed pending the Commission's final decision on any petition filed hereunder.

"(e) Findings by the Commission as to the effect upon the public interest, convenience, and necessity of the grant of an application or renewal or modification *thereof* for a community antenna television system which was not in operation on the date of

the enactment of this section or for modification of a license for a community antenna television system which was in operation on the date of enactment of this section shall be made with due regard for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service. The provisions of section 309 shall apply to the issuance of licenses, modifications, and renewals thereof under this subsection.

"(f) (1) Upon application by the licensee of a television broadcast station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system provides television programs to local subscribers, the Commission may require that such community antenna service shall regularly redistribute programs broadcast by such local television broadcast station.

"(f) (2) The Commission may, by rule or order, prescribe such standards and conditions as it may find necessary to assure that the reception of the programs redistributed by the community antenna television system under subsection (1) shall be reasonably comparable in technical quality to the reception of programs of other television stations redistributed by the community antenna television system.

"(f) (3) The Commission also may, by rule or order, prescribe the period of time within which community antenna television systems shall complete preparations for and commence the redistribution of programs under subsections (1) and (2).

"(g) The Commission shall prescribe appropriate rules and regulations in order to avoid the duplication of programs broadcast or scheduled to be broadcast

by a television station (other than a station engaged solely in rebroadcasting) which is assigned to a community in which a community antenna television system serves subscribers by such communtiy antenna television system redistributing the signals of another television station. In promulgating such rules and regulations the Commission shall be guided by the standard set forth in subsection (e) of this section, requiring that due regard be given for the desirability of facilitating the continued operation of a television station which is providing the only available locally originating television broadcast program service."

The Committee report explained the purpose of the bill was to place CATV under the jurisdiction of the FCC.

> This bill is designed to amend the Communications Act of 1934 so as to place community antenna television systems (CATV) under the jurisdiction of the Federal Communications Commission and to empower the Commission to issue requisite certificates of public interest, convenience, and necessity for the construction and operation of community antenna television systems. This bill declares CATV systems not to be common carriers and sets forth the sections of title III of the Communications Act affecting regular broadcasters that are to apply to the community antenna television systems.
>
> (Senate Report 923, p. 3)

The Report summarized the Commission's treatment of CATV since its inception and referred to its disclaimer of jurisdiction in *Frontier Broadcasting v. Collier,* 16 Pike and Fischer R.R. 1005 (April 1958).

> The question of the FCC's jurisdiction over community antenna television systems and the type of

> regulation that should be imposed was raised many years ago. The FCC's files make it clear that this issue was presented to it as early as 1950 and that its staff recommended that it exert authority in this field. But, the Commission has long hesitated over the matter. In speeches by individual commissioners and in testimony before your committee, doubt as to its power has been expressed but no official ruling was made until April 21, 1958, when the FCC decided a long-pending proceeding instituted by a group of small-town broadcasters who asked that the Commission regulate CATV systems as common carriers. (*See Frontier Broadcasting Company v. Collier,* 16 R.R. 1005 (April 1958). The Commission's final action in this matter made it perfectly clear that it did not intend to regulate CATV systems in any way whatsoever. However, on May 22, 1958, the FCC instituted an inquiry into the impact of community antenna television systems, television translators, television satellite stations, and television reflectors upon the orderly development of television broadcasting (docket No. 12443) and included as part of that proceeding the reconsideration of the above-mentioned *Frontier Broadcasting* case. (Senate Report 923, p. 5)

After several amendments to the bill were offered, S. 2653 was debated on the Senate floor on May 17 and 18, 1960. Senator Pastore, chairman of the sponsoring committee, was the floor leader and explained that the bill was not designed to hurt CATV, but merely place it under regulatory control:

> This bill is not directed in any way toward injuring CATV as such. We seek merely to place CATV systems under regulation in order to protect their rights, and also to protect the rights of the only available broadcasting station, which may perish and go out of

existence unless proper reforms are taken now of a very moderate nature.
(106 Cong. Rec. 10417)

Senator Pastore was questioned at length on the purposes of the bill and explained it was a new delegation of authority of jurisdiction over CATV. In a brief colloquy Senator Pastore stated:

Mr. CURTIS. First, I thank the distinguished Senator for his long efforts in a difficult area. I have given very limited study to S. 2653. It appears to me that the proposed legislation places the community antenna systems under the jurisdiction of the Federal Communications Commission. To that extent there is a delegation of authority to them. Does the bill directly prohibit or outlaw any act that the community antenna systems are doing now?

Mr. PASTORE. I do not think so, aside from the fact that now they are at liberty to take a picture from a broadcasting station in Phoenix and show it in Yuma, for example. It may be earlier than the picture would be shown on the local broadcasting station in Yuma, and if the broadcasting station at Yuma made an application to the FCC, it could bring that to a stop. That would be a deprivation of some activity. That is about as far as it would go.

Mr. CURTIS. The bill grants to the Commission the right to look into that situation?

Mr. PASTORE. And to make rules and regulations.

Mr. CURTIS. To make rules and regulations.

But in the absence of action by the Commission, is there anything in the bill which prohibits what the community antenna systems can do?

Mr. PASTORE. I would not say so, unless the Senator sees something in the bill to the contrary.
(106 Cong. Rec. 10425)

In answer to questions by Senator Kerr, an opponent of the bill and the grant of jurisdiction to the FCC over CATV, Senator Pastore explained that the jurisdictional grant was necessary to develop an orderly system of TV:

> Mr. PASTORE. Then it is necessary to put these people under regulation, so that as new licenses are granted the Federal Communications Commission will have jurisdiction. The FCC then will be in a position to develop an orderly system of TV. However—and this must be borne in mind—insofar as harassment is concerned, or so far as a burden may be incurred, because of the duties that are imposed upon a CATV organization where there is no problem, I would assume the action of the Federal Communications Commission would be nothing more than perfunctory. (106 Cong. Rec. 10426)

The Kerr-Pastore debate demonstrated that the issue before the Senate was whether the FCC was to gain jurisdiction over CATV through the passage of the amendment—jurisdiction which it admittedly lacked:

> Mr. KERR. Did it ever occur to the Senator from Rhode Island that there are hundreds and thousands of American businesses in operation who are praying unto the Lord and their Government to protect them by keeping them free of regulation, rather then imposing it on them and then having them depend upon a legislative record made on the floor of the Senate which, if someone downtown whose identity we do not know, is controlled by it, will let them loose after they have paid a bunch of lawyers in Washington to come down to get them loose?
>
> The Senator says he cannot write a bill to protect these people. Apparently the Senator does not know his own ability.
>
> * * *

Mr. PASTORE. There was not one representative of a CATV who appeared before our committee who did not say that he wanted to be regulated. I call as my chief witness the Senator from Oklahoma [Mr. MONRONEY], who is going to make the motion to recommit the bill. As a matter of fact, Senator MONRONEY introduced a bill himself to regulate the entire industry. However, that bill is only a shell. It does put them under regulation, but it does not regulate.

Mr. KERR. Next to not being under it, that is the best shape one can be in.
(106 Cong. Rec. 10426)

Senator Pastore urged that by conferring jurisdiction over CATV, the bill would actually provide protection to CATV systems against exorbitant charges by the broadcast station, should the stations prevail in pending copyright litigation. Senator Kerr countered that the FCC through its present jurisdiction over the broadcasters could protect CATV without extending its jurisdiction to CATV.

Mr. KERR. Did the Senator from Rhode Island say the Federal Communications Commission, which has control of the station whose signal is being picked up, could not control them without this act?

Mr. PASTORE. I did not say that.

Mr. KERR. That is what the Senator did say.

Mr. PASTORE. I said the CATV would not have any right to go before the FCC.

Mr. KERR. Who says they would not?

Mr. PASTORE. I say so.

Mr. KERR. Who prescribes that?

Mr. PASTORE. Because the Senator says they should be put under the CATV. That is just the point.

Mr. KERR. Cannot a person go into court and ask for justice, without being set aside by the court?

Mr. PASTORE. The FCC is not a court. It is a regulatory body. We are trying to put the parties under this body with appropriate procedures.

Mr. KERR. The Senator wants to make them slaves, without provision for protection of their lives. How silly can one get?

Mr. PASTORE. I am not silly. I am talking about jurisdiction.

Mr. KERR. So am I.

Mr. PASTORE. I am talking about jurisdiction, and there is nothing silly in it.

Mr. KERR. The Federal Communications Commission does not have to be given regulatory control over any citizens to enable those citizens to go before that Federal Communications Commission and file a petition.

Mr. PASTORE. A petition to do what?

Mr. KERR. To enforce any right that an American citizen has with reference to that Commission's jurisdiction.

Mr. PASTORE. The Senator could not be more wrong than he is.

(106 Cong. Rec. 10429)

Senator Pastore, the floor manager, insisted that the bill was necessary to confer CATV jurisdiction upon the FCC, and that without it, the Commission was powerless to act.

Regarding the effects of the bill in conferring jurisdiction, Senator Monroney emphasized that it would provide unprecedented economic protection to broadcasters.

> The only test for the granting of a license for a television or a radio station, in the long history of the Federal Communications Act, has been, Is there a frequency

available which will not interfere with the frequency assigned to someone else? A hundred television stations could be established if frequencies were available for them. If there is a radio station in Yuma, six stations could be put in if frequencies could be found for them. But we have never contemplated granting economic protection to licensees until this bill was introduced. We are breaking entirely new ground, which will extend in the future to such a point that other people will want to install television in an area, and it will be necessary to provide economic protection for the local single station. I do not think such a policy has ever been established.
(106 Cong. Rec. 10535)

Senator Monroney compared the immunity from FCC regulation of reception and cable distribution by CATV to that enjoyed by the television networks:

Mr. LONG of Louisiana. Does the bill violate the principle that the airways are free and are available to everyone?

Mr. MONRONEY. I do not think it does. But it violates the principle of not having Federal regulation of cable transmission.

Let me state the best illustration: All of us know that the mightiest force in television, which controls 90 percent of all television programs received by viewers in the United States, are the networks. They are not subject to regulation, and very few Members of Congress would want them to be regulated. Why? Because the concept of the Federal Communications Act is that the networks themselves are not putting anything on the air. They use cables to carry the signals to the local stations. So they are not regulated.

So we do not regulate—and I do not think we should —the mighty giant of television which supplies the television diet of 50 million television sets by carrying the television program signals by cable to the viewers.

But if the quite similar CATV systems are to be regulated by means of this bill, we shall be establishing a precedent; and in that event I do not see how we can properly regulate the smallest midget in the industry, but fail to give some consideration to regulating the mighty networks which are carrying signals by means of a similar system, and also without using the airways. (106 Cong. Rec. 10536)

Senators opposing the amendment recognized that the bill was designed to provide economic protection for television.

Mr. McCLELLAN. The meaning of the word "facilitate," as I understand it, is to make easy or less difficult; to free from difficulty or impediment. In other words, it is to facilitate the execution of a task; to lessen the labor of; to assist; aid.

In other words, the station owner could petition the Federal Communications Commission to impose conditions that will facilitate, that will aid, that will remove any difficulty, that will remove encumbrance or hindrence to the continued operation of that station.

Mr. MONRONEY. Which would mean limiting competition, which this bill is designed to do, from newly constructed CATV's.

* * *

Mr. McCLELLAN. In other words, the rules the Commission promulgates must be promulgated to achieve that purpose. That is the proposed law we are considering. I am not saying it is not a good thing,

but I think we ought to know what it does. This provision sets up a TV station in a position of preferred consideration, and in a position of preferred consideration in competition with another station.
(106 Cong. Rec. 10537)

Senator Long registered concern over the economic advantage to broadcasters conferred by the bill.

Mr. LONG of Louisiana. I am referring to page 4 of the bill, at line 21, where it provides:

A television station * * * may petition the Commission to include in such license such conditions on the community antenna television system's operation as will significantly facilitate the continued operation of a television station which is providing the only available locally originated television broadcast program service.

The thought that occurs to me is that it would seem to go far enough to say that the community antenna system should not impose any undue injury of hardship on the television station. However, to say that it could be required to operate in a manner to facilitate the continued operation of the competitor and system in his business, is too much to ask.

* * *

Mr. LONG of Louisiana. As the law stands today there is nothing in the law by which the FCC can prevent one television station from driving another one out of business. I have seen that happen in my state, where a VHF station came into the community which had a UHF station, by providing a better signal and better programs.
(106 Cong. Rec. 10541)

Senator Hickenlooper questioned whether the proposed amendment conferring jurisdiction upon FCC was constitutional.

> Mr. HICKENLOOPER. Mr. President, I merely wish to ask some questions of the Senator from Oklahoma or of another Member of the Senate.
>
> It seems to me that a rather conplicated legal situation could arise in this instance. As I understand, a CATV station merely takes something out of the air, and does not put anything into the air.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. After it takes something out of the air—just like using the air we breathe—it then wires it, by means of a physical operation, into a house, where it is hooked up to a television set.
>
> Mr. MONRONEY. That is correct.
>
> Mr. HICKENLOOPER. What justification is there for having the Federal Government move into that regulatory field? Can it be called interstate commerce? If so, can the Federal Government then regulate my radio set in my house because I take the signal out of the air by means of an aerial erected on top of my house?
>
> Mr. MONRONEY. This presents a problem, because many think this is exclusively in the field of interstate commerce. Of course, the ether waves are interstate. But when the signal is taken out of the air and is transmitted to the Senator's house by cable, that is purely intrastate.
>
> (106 Cong. Rec. 10543)

The issue to recommit the bill was plainly and openly acknowledged as an attempt to defeat it.

> Mr. KERR. Mr. President, I rise in support of the motion to recommit the bill. I do it for the simple reason that I think it is an absolute necessity to protect the well-being and the opportunity for existence of over 760 small businesses.
> (106 Cong. Rec. 10544)

The bill was recommitted by a vote of 39 to 38, 106 Cong. Rec. 10547. A vote to reconsider failed 38 to 36. As a post mortem to the defeat of S. 2653, Senator Moss, a proponent of the bill, asked for further study by Congress as to whether, in view of the bill's failure to pass, appropriate legislation should be enacted to grant the FCC some jurisdiction over CATV in order to protect local television.
(106 Cong. Rec. 11462)

Throughout the lengthy debate, both proponents and opponents assumed that the legislation was necessary in order to confer jurisdiction upon the FCC over CATV. The legislation failed to pass.

II

On February 22, 1961 in the 87th Congress, 1st Session, S. 1044 was introduced, entitled "a bill to amend the Communications Act of 1934 to authorized the Federal Communications Commission to issue rules and regulations with respect to community antenna television systems." Placed in the record was an explanatory statement prepared by the Commission, which states in part:

> In examining into this matter the Congress considered numerous legislative proposals and held hearings thereon. Two of these proposals, S. 2653 and H. R. 11041, would have established a broad-scale and mandatory licensing scheme for the some 500-700 community antenna television systems which are already in existence, as well as those proposed to be established in the future. While the Commission was in accord with

the general objective of these bills, it expressed the view that they were unnecessarily comprehensive in scope; would reach into situations which did not affect local television stations; and would unnecessarily add to the already large licensing functions of the Commission.

In contrast to the unduly widespread scope of these bills, the instant proposal is designed to vest in the Commission authority to act in those situations where local television stations are operating under inequitable disadvantages in competition with community antenna television systems. The Commission would thereby be enabled to address itself to the problem situations in the CATV-local station areas under a general power to make appropriate adjustments through the issuances of appropriate rules, regulations, and orders. The Commission would not, however, be encumbered by the administration of a mandatory licensing scheme for community antenna television systems, including the large number of such systems which are providing the only television service to sparsely settled areas.
(107 Cong. Rec. 2524)

* * * * *

Another instance of the way in which the Commission's jurisdiction might be exercised in appropriate situations lies in the field of duplication by CATV systems of programs being carried by the local station. The Commission would be empowered under the proposed legislation to order such adjustments as would, on an appropriate basis, permit the CATV system to continue to provide multiple television services, and at the same time afford to the local station some protection in its program offerings.

Since this legislative proposal looks to a limited jurisdiction over CATV's under the Communications Act of 1934, as amended, the enforcement and review

> provisions in section 312 (b) and titles 4 and 5 of the act would be available in connection with rules, regulations, and orders issued by the Commission with respect to CATV operations. (107 Cong. Rec. 2524)

Implicit in this memorandum is the understanding that such legislation was necessary in order to authorize the Commission to promulgate rules and regulations over CATV.

III

In the 89th Congress, S. 3017 was introduced on March 4, 1966, 112 Cong. Rec. 4689. [1] It was entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill provided no regulatory scheme or rules as did S. 2653, but merely conferred jurisdiction over CATV upon the FCC. It also barred program origination by CATV, and relegated it to the role of receiving and distributing broadcast signals. This bill was submitted subsequent to the FCC's assumption of jurisdiction and was designed, in the words its chairman, a confirmation of jurisdiction.

> The Commission had determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate.
>
> * * *

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[1] Citations to pages from the 89th Congress are to the daily edition, since the permanent edition is not yet available.

> Of prime importance is the proposed new section 331(a)(1) of the act, which would expressly confer upon the Commission, in broad and comprehensive terms, authority to regulate community antenna systems in the public interest. This authority is to be exercised only to the extent necessary to carry out the purposes of the Communications Act, particularly the establishment and maintenance of broadcast services and the provision of multiple reception services. There is thus a congressional recognition of the public service rendered by the broadcast and CATV industries and a directive to promote the orderly growth of both industries. (112 Cong. Rec. 4690)

Also, submitted along with the explanatory statement is the dissenting statement of Commissioner Loevinger who adhered to the previous FCC rulings that it had no jurisdiction.

SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER REGARDING PROPOSED CATV LEGISLATION

> I believe it is necessary for Congress to legislate on the subject of community antenna television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 R R 2d 1679, 1712. If the Commission is to act in this field, legislative authorization is, therefore, necessary.

* * *

It would be desirable for Congress to establish more specific standards for administrative action than are contained in the proposed bill. But it is appropriate for Congress to delegate broad authority for the Commission to act under whatever standards Congress may see fit to establish.

Accordingly I join in recommending that Congress consider the proposed bill submitted herewith and enact legislation in such form as may best express the congressional view of the proper way to deal with the problems involving FCC jurisdiction to regulate CATV systems, the operation of CATV systems, the relations of CATV systems to conventional broadcasting stations, and the relation between Federal and State jurisdiction in this field.
(112 Cong. Rec. 4691)

The bill S. 3017, contains the following language:

"That section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof a new subsection to read as follows:

"(gg) 'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

SEC. 2. The Communications Act of 1934 is further amended by adding a new section to read as follows, entitled:

"COMMUNITY ANTENNA SYSTEMS"

SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority:

"(1) to issue orders, make rules and regulations and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast service and the provision of multiple reception services;

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) Nothing in this Act or any regulation promulgated hereunder shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State

or Territory, the District of Columbia, the Commonwealth of Puerto Rico or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated hereunder."

IV

Again in the 89th Congress 2d Session a bill was introduced conferring jurisdiction over CATV. On June 17, 1966 the House Committee on Interstate and Foreign Commerce issued Report No. 1635, accompanying H.R. 13286, entitled "a bill to amend the Communications Act of 1934 to authorize the Federal Communications Commission to issue rules and regulations with respect to community antenna systems, and for other purposes." The bill, as amended, provides:

> That (a) section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended by adding at the end thereof the following new subsection:
>
> "(gg)'Community antenna system' means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more broadcast stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."
>
> (b) Subsection (h) of such section 3 is amended to read as follows:
>
> "(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio or in interstate or foreign transmission of energy, except where

reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting or in operating a community antenna system shall not, insofar as the person is so engaged, be deemed a common carrier."

SEC. 2 Part I of title III of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"COMMUNITY ANTENNA SYSTEMS"

"SEC. 331. (a) The Commission shall, as the public interest, convenience or necessity requires, have authority —

"(1) to issue orders, make rules and regulations, and prescribe such conditions or restrictions with respect to the construction, technical characteristics, and operation of community antenna systems, to the extent necessary to carry out the purposes of this Act, with due regard to both the establishment and maintenance of broadcast services and the provisions of multiple reception services; and

"(2) to make general rules exempting from regulation, in whole or in part, community antenna systems where it is determined that such regulation is unnecessary because of the size or nature of the systems so exempted.

The Commission shall, in determining the application of any rule or regulation concerning the carriage of local broadcast stations by community antenna systems, give due regard to the avoidance of substantial disruption of the services to subscribers of community antenna systems which were in operation on

March 1, 1966, resulting from the limited channel capacity of any such systems.

"(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmissions without any additional charge to subscribers.

"(c) The Commission shall prescribe such rules and regulations and issue such orders as may be necessary to require the deletion by community antenna systems of signals carrying any professional football, baseball, basketball, or hockey contest if, after application by the appropriate league, the Commission finds that the failure to delete such signals would be contrary to the purposes for which the antitrust laws are made inapplicable to certain agreements under Public Law 87-331.

"(d) Nothing in this Act or any regulation promulgated under it shall preclude or supersede legislation relating to, or regulation of, community antenna systems by or under the authority of any State, the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States except to the extent of direct conflict with the provisions of this Act or regulations promulgated under it."

In the purposes of the legislation the Committee was cautious not to challenge the FCC's already assumed jurisdiction.

> The principal purposes of the legislation are to —
> (1) delineate the scope of the authority of the Federal Communications Commission to regulate CATV systems. (H. R. Rep. No. 1635, p. 2.)

The Committee pointed out that although the Federal Communications Commission had asserted its jurisdiction over CATV, the Committee would not state a position, except to say that the Congress should confer this jurisdiction.

> In reporting the instant legislation, the committee does not either agree or disagree with the above conclusions. Test cases are pending at present in the courts. Therefore, the question of whether or not and to what extent the Commission has authority under present law to regulate CATV systems is for the courts to decide in such cases.
>
> It is the considered judgment of the committee, however, that in order properly to regulate broadcasting and communications in the United States the Commission should have the broad powers which the instant legislation would confer upon the Commission to regulate CATV systems. (H. R. Rep. No. 1635, p. 9)

The Commission, in its explanatory note attached to the Committee report, candidly admitted it wished the Congress to confirm jurisdiction which it had assumed.

> The Commission has determined that it has jurisdiction over all CATV systems, and it has asserted that jurisdiction to the extent necessary to carry out

> the announced regulatory program. However, given the importance of CATV, we believe it highly desirable that Congress amend the Communications Act to confirm that jurisdiction and to establish such basic national policy as it deems appropriate. (H.R. Rep. No. 1635, p. 16)

Commissioner Loevinger issued a separate statement explaining that although he favored the proposed legislation, he believed it necessary to confer jurisdiction upon the FCC.

> I believe it is necessary for Congress to legislate on the subject of Community Antenna Television and that the draft of proposed legislation submitted herewith by the FCC is the best compromise that can now be agreed upon. It is my opinion that under the present statutes the Commission does not have the jurisdiction which it claims over CATV's. See my separate opinion at 4 RR 2d 1679, 1712. If the Commission is to act in this field legislative authorization is, therefore, necessary. (H.R. Rep. No. 1635, p. 20)

The Department of Justice, in response to a request for its views, was careful not to state an opinion as to whether the FCC had jurisdiction over CATV.

> The principal purpose of the bill is to clarify and confirm the Commission's jurisdiction over community antenna systems in order that the Commission shall have clear authority to integrate community antenna service into the national broadcast structure in such a way as to promote maximum service to everyone, including both those

> persons who are dependent upon off-the-air service and those who may receive cable service.
> (H.R. Rep. No. 1635, p. 21)

The minority report of the Committee did not hesitate to state its position that the Commission lacked jurisdiction over CATV and that the Commission had unlawfully usurped this jurisdiction.

> H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give its jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; it would thwart the judicial processes which are presently considering the issues involved; it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a

person could or could not receive over his television or radio set—to name a few of the flaws.

Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this

attempt by the passage of a bill denying them the power to enter the field of economic control.

H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

A CATV system is a wired communications system and does not use the spectrum or public domain for broadcasting pruposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does

cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control ofer the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Commission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communications Act prohibits censorship.

If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals—jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires

that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

* * *

It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly—an entirely new concept in governmental regulation.

The Congress of the United States should not abdicate its legislative powers and delegate to a commission the power to write substantive law by rules and regulations promulgated by an appointed body.

If the Federal Government is to enter a new field of regulation, the manner and extent to which this will be undertaken should be definitely and explicitly spelled out by the duly elected representatives of the people of this country in the Congress of the United States and not by a board, a bureau, or a commission wholly and completely insulated from the electorate. (H.R. Rep. No. 1635, pp. 23-29)

The minority views, in respect to the powers of the Commission and its lack of jurisdiction over CATV, were not disputed by the majority, which merely urged passage of the legislation. A second minority report also strenuously objected to the jurisdictional grab by the FCC.

> Community antenna television systems have been around since 1950, and until 1965 the Federal Communications Commission very clearly indicated that it did not pretend to have jurisdiction over the transmission of broadcast signals by cable. In fact it specifically denied having such jurisdiction. Suddenly, however, the Commission did a complete turnabout and argued that it had always possessed authority to regulate cable television as an extension of broadcasting and its recognized interstate character. By a 5 to 2 decision the Commission determined that the Communications Act of 1934 meant something else and something more than it clearly is. When we consider the fact that the makeup of this Federal agency changes rapidly, such action can lead to dangerous consequences.
>
> Apparently uncertain of its ground, the Commission prepared and suggested a most peculiar piece of legislation which is H.R. 13286. Even a casual reading of this bill will indicate that it makes no attempt to determine a broad policy under which the CATV industry should develop in conjunction with the broadcasting industry. Instead it merely grants broad authority, throwing the whole problem to the Federal Communications Commission and hoping for the best.
>
> Most of the 30 amendments which were offered by members of the committee during the deliberations on this bill were intended to show the will of

Congress and to provide reasonably clear guidelines. They were offered in an attempt to make this bill at least reasonably consistent with past principles for the regulation of industry. They were defeated.

The result of passing H.R. 13286 would be to create havoc within an industry of great importance to the public because the policies adopted by the Commission for its regulation today could well be reversed or radically changed a month or a year hence. There are no general principles to which the industry can point or by which the Congress may oversee the activities of its creature, the Federal Communications Commission.

In the case of broadcasting facilities the Federal Communications Commission must allocate a frequency and issue a license therefor. In the case of community antenna systems there is no provision for licensing, but the bill does grant authority to issue permits for construction. This of course means that construction authority can be denied to any applicant. Under the terms of this bill construction permits would be within the complete discretion of the Commission. In our opinion this grants to the Federal Communications Commission a completely unacceptable and probably unconstitutional power over this industry.

* * *

There are presently pending lawsuits which will determine whether or not the Federal Communications Commission was right when it first denied having jurisdiction over CATV or whether it was right later when it reversed itself. Also pending are lawsuits to determine the applicability of the copyright laws to material carried by CATV systems.

> The determination of these matters requires no legislation and little purpose is served in passing such legislation at this time, particularly since it does not purport to lay down realistic policies and guidelines within which regulation of the CATV industry can logically proceed. (H.R. No. 1635, pp. 26-27)

The bill failed to reach the floor for vote.

APPENDIX C

Statutes and Administrative Rules
Administrative Procedure Act, 5 U.S.C.
Sections:

Section 551 - Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

Section 551 (Cont.)

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

Section 554 - Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

Section 554 (Cont.)

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Section 556 - Hearings; presiding employees; powers and duties; burden of proof; evidence: record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

Section 556 (Cont.)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Section 557 - Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by

Section 557 (Cont.)

rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 558 - Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

Section 558 - (Cont.)

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Communications Act of 1934, 47 U.S.C. Sections:

Section 151 - Purposes of act; Creation of Federal Communications Commission

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Section 154 - Provisions relating to the Commission

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 - General powers of the Commission

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(h) Have authority to establish areas or zones to be served by any station;

(m)(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

Section 303 (Cont.)

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act:

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.[45]

Section 307 - Allocation of facilities; term of licenses

(b)[48] In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 309 - Action upon applications; form of and conditions attached to licenses

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 309 (Cont.)

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.[54b] Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 312 - Administrative Sanctions

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

Section 312 (Cont.)

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.[59]

Section 315 - Facilities for candidates for public office

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he

Section 315 (Cont.)

shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby [61] imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act [61a] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.[61b]

Section 316 - Modification by Commission of construction permits or licenses

(a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested,

Section 316 (Cont.)

why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.[62]

Section 317 - Announcement with respect to certain matter broadcast

(a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

(b) In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Section 317 (Cont.)

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.[63]

Section 326 - Censorship; indecent language

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[71]

Section 403 - Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Section 508 - Disclosure of certain payments

(a) Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Subject to subsection (d), any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

(c) Subject to subsection (d), any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d), an announcement is not required to be made under section 317.

(e) The inclusion in the program of the announcement required by section 317 shall constitute the disclosure required by this section.

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than $10,000 or imprisoned not more than one year, or both.[102]

Selected provisions of the Federal Communications Commission's Microwave and CATV rules and regulations, 47 C.F.R. Sections

§ 21.712 Authorizations for fixed stations to relay television signals to CATV systems.

Authorizations (including initial grants, modifications, assignments or transfers of control, and renewals) in this service to establish or operate fixed stations used to relay television signals to community antenna television systems (CATV systems), either directly or indirectly, shall contain the condition that the licensee carrier shall offer service by means of such stations in accordance with the following requirements, which the licensee carrier shall also include, or cause to be included, in its tariffs for service to any CATV system or other subscriber proposing to utilize such service to relay television signals to any CATV system, either directly or indirectly:

(a) *Certification.* The carrier shall require that any subscriber ordering service indicate whether the service is to be utilized for relaying television signals to any CATV system, either directly or indirectly, and in such event the carrier shall require that the subscriber at least thirty (30) days prior to receiving service file a certification with the carrier, and a copy for the Federal Communications Commission, stating that he has complied with the notification provisions set forth in paragraph (b) of this section, and that each such CATV system will comply with the provisions set forth in paragraphs (c) through (i) of this section. Such certification to the carrier and copy for the Federal Communications Commission shall be supported by copies of the letters of notification sent to television broadcast licensees or permittees pursuant to the requirements of § 21.712(b), and by a statement from each such CATV system indicating willingness to comply with § 21.712. Such copies for the Federal Communications Commission shall be forwarded to the Commission by the carrier at least thirty (30) days prior to commencing service.

(b) *Notification of request for service.* Any such CATV system or other subscriber proposing to utilize

such service to relay television signals to any CATV system, either directly or indirectly, shall notify the licensee or permittee of any television broadcast station, within whose predicted Grade B contour the CATV system operates or will operate in whole or in part, and the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, of the request for service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such notice shall include the fact of the request for service, identification of each CATV system to utilize the service requested (either directly or indirectly), identification of the community served or to be served by each CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community

of the system, in whole or in part, with 100 watts or higher power.

(d) *Exceptions.* Nothwithstanding the requirements of paragraph (c) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (g) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

[*§ 21.712(c) and (d)(3) amended, (d)(4) adopted eff. 2-28-67; VII (66)-3*]

(e) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and non-cable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(f) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art) ;

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) ; and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(g) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (h) and (i) of this section.

(h) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as

soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(i) *Exceptions.* Notwithstanding the requirements of paragraph (h) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than two network programs (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section) ;

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved ; and

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity.

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(j) *Disputes between television broadcast or translator stations and CATV systems; requests for waiver of the rules or for different treatment.* In the event that a dispute should arise, at any time, between a television broadcast or translator station and a CATV system served under an authorization subject to this section, on the question of whether the CATV system is complying with the applicable requirements, the matter may be referred to the Commission for a ruling pursuant to the provisions of § 74.1109 of this chapter, either by the licensee carrier, or by the station, or

CATV system, with notice to the licensee carrier. Where a dispute has been referred to the Commission for a ruling or where a petition for waiver of the rules or for different requirements has been filed under § 74.1109 of this chapter, with notice to the licensee carrier, microwave service to the relevant subscriber shall not be commenced or terminated until thirty (30) days after the Commission's ruling has been received by the licensee carrier.

(k) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

NOTE 1: As used in § 21.712(b), the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

[*Subpart K (§§ 74.1101–74.1109) as adopted eff. 4–18–66; except for § 74.1103 which is eff. 6–17–66 as it pertains to existing operations of nonmicrowave CATV systems and §§ 74.1105, 74.1107, and 74.1109 which are eff. 3–17–66; III(64)–12*]

§ 74.1100 Cross reference.

See § 74.11.

[*§ 74.1100 adopted eff. 2–28–67; III(64)–16*]

§ 74.1101 Definitions.

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Nothwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art) ;

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) ; and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

'(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted. '

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

[*§ 74.1103(a) and (b)(3) amended, (b)(4) adopted eff. 2-28-67; III(64)-16*]

§ 74.1105 Notification prior to the commencement of new service.

(a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within

sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any.

(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however,* That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is deter-

mined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

NOTE 2: As used in § 74.1105, the term "television broadcast station" includes foreign television broadcast stations.

[*§ 74.1105 amended in III (64)–16; Note 2 adopted eff. 7–14–67; III (64)–18*]

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by § 74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such a response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system

making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66–220, paragraphs 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

(c) Within 60 days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same proceeding as the earlier requests.

NOTE 1: As used in § 74.1107, the term "television broadcast station" includes foreign television broadcast stations.

[*§ 74.1107 amended in III(64)–16 and III(64)–17; Note 1 adopted eff. 7–14–67; III(64)–18*]

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

[*Subpart K (§§ 74.1101–74.1109) as adopted eff. 4–18–66, except for § 74.1103 which is eff. 6–17–66 as it pertains to existing operations of nonmicrowave CATV systems and §§ 74.1105, 74.1107, and 74.1109 which are eff. 3–17–66; III(64)–12; § 74.1109(h) as adopted eff. 6–17–66; III(64)–13.*]